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IMMERSION SEMINAR
IT'S MORE THAN JUST A HEADLINE!
January 1, 2020 to August 10, 2021
(Third Annual)

Submitted by: Kathleen A. McCarthy, J.D.
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THE LAWYER'S LENS
IT'S MORE THAN JUST A HEADLINE!

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CHILDREN'S ISSUES

1. ***HUBERT/CARMONY*: ARIZONA MAY NOT DECLINE JURISDICTION BASED ON *FORUM NON CONVENIENS* IN A UCCJEA MATTER WITHOUT: (1) EXPRESSLY CONSIDERING AND MAKING FINDINGS ON ALL RELEVANT FACTORS INCLUDING THOSE LISTED IN A.R.S. § 25-1037(B); and (2) CONDUCTING AN EVIDENTIARY HEARING. COURT MUST MAKE A RECORD OF ALL NON-ADMINISTRATIVE INTER-STATE JUDICIAL CONFERENCES AND PROVIDE THE RECORD TO THE PARTIES; and MAY ONLY STAY AN ACTION, NOT DISMISS IT**

Father filed a paternity action in Arizona (the child's home state) after Mother fled to El Paso. Father subsequently requested sole legal decision-making with parenting time in Mother. Prior to the Arizona hearing, Mother filed: (1) a custody petition in Texas; (2) an application for temporary restraining order; and (3) an Arizona motion to dismiss Father's petition.

At the Arizona hearing, the Arizona court determined it had jurisdiction, set a trial date, appointed an attorney for the child and entered parenting time orders. In April 2020, Father requested that the Arizona court hold Mother in contempt for her refusal to allow him to see the child. Before trial, Mother requested the Arizona court to transfer the case, alleging Texas was the more convenient forum. The Arizona and Texas judges then conferred, after which Arizona declined and relinquished jurisdiction based on *forum non conveniens*.

Division One granted Father's appeal, holding as follows:

1. Before Arizona declines jurisdiction, it must allow the parties to submit information and it shall consider all relevant factors including those listed in A.R.S. § 25-1037(B). It shall also make findings on all of the factors. A.R.S. § 25-1037. A failure to address any finding is an abuse of discretion. The best evidence that a court has considered all the factors is the findings, which also facilitate appellate review.

2. Although Arizona may communicate with a court in a foreign state concerning a proceeding under A.R.S. § 25-1010(A) without permitting party participation, the court must give the parties an opportunity to present facts and arguments before a jurisdictional decision is made. Although courts may communicate on administrative matters without making a record, on all substantive matters the court must make a record of the communication, promptly inform the parties of the communication and grant them access to that record. 25-1010[c].

3. Where children's best interests are at stake, waiver of procedural objections is inapplicable.

4. Due process requires that a court provide a forum for witness testimony and that it must refrain from resolving matters of credibility on documents alone.

5. An Arizona court may stay, but shall not dismiss, a case when it declines jurisdiction under the UCCJEA's inconvenient forum statute.

In re the Matter of Hubert and Carmony, No. 1 CA-CV 20-0362 FC, 2021 WL 2549006, ___ Ariz. ___ (Division One: June 22, 2021).

2. *EMILIE DLM*: CALIFORNIA: HAGUE CONVENTION: FAILURE BY PARENT TO MITIGATE THE GRAVE RISKS OF HARM TO CHILDREN DUE TO PARENT'S ACTS OF DOMESTIC VIOLENCE AND EMOTIONAL ABUSE AND ALCOHOL MISUSE IS SUFFICIENT TO DENY PETITION FOR RETURN OF CHILD

In this appeal concerning an international custody dispute involving the two minor children of an American mother and a Chilean father, mother was subjected to acts of domestic violence and emotional abuse by father, which were sometimes committed in the presence of the children. The court concluded that it is a reasonable inference from the evidence that father will continue to drink to excess and drive while intoxicated, thus exposing his children to a grave risk of harm. Given father's failure to acknowledge his excessive drinking and acts of domestic violence, as well as his repeated acts of driving

while intoxicated, the court explained that there are no ameliorative measures that will mitigate the grave risk of harm to his children.

> ***In re Marriage of Emilie D.L.M. & Carlos C.,*** 64 Cal. App. 5th 876, 279 Cal. Rptr. 3d 330 (2021), as modified (May 28, 2021).

3. ***MARGAIN*: MEXICO'S DECLINATION OF HOME STATE JURISDICTION BASED ONLY ON THE FINDING IN A HAGUE CONVENTION MATTER, BUT NOT THE UCCJEA, WAS SUFFICIENT FOR ARIZONA TO EXERCISE JURISDICTION BECAUSE: (1) MEXICO HAS NOT ADOPTED THE UCCJEA; and (2) ITS FINDINGS CLEARLY INDICATED IT HAD DECLINED JURISDICTION, LEAVING NO OTHER HOME STATE; THE LACK OF SIGNIFICANT CONNECTIONS TO THE CHILD IN ARIZONA ARE IRRELEVANT WHERE THE CHILD'S HOME STATE DENIES JURISDICTION**

After a long and winding tale of international child custody jurisdiction intrigue, this is – one hopes – the final chapter.

> **Chapter 1: Arizona Trial Court Declines to Recognize Mexico Custody Order, and orders that Arizona has Jurisdiction.**

It all started with a dissolution action filed by Father in Mexico in 2011 when the child (born in California) was 3 years old. The child is now almost 13. Along the way, each parent took their turn at absconding with the child. At the time the divorce was filed, the child had lived in Mexico for at least six months. In 2013, Father sought return of the child to Mexico by filing a Hague Convention action, which was denied. In 2014, the Supreme Court of Mexico affirmed jurisdiction was properly in Mexico and granted Father definitive legal custody ("Initial Mexico Order"). Father then filed a petition in the Pima County Superior Court seeking to enforce this Order. The trial court denied it, finding that the Initial Mexico Order had not been made in substantial conformity with the UCCJEA.

> **Chapter 2: In 2016, Division Two Requires Recognition of The Initial Mexico Order Leaving Jurisdiction in Mexico**

In 2016, Father appealed the Arizona trial court ruling. Pending that appeal, Father absconded with the child back to Mexico in violation of an Arizona Order. Division Two, however, reversed the trial court and, instead, held that Mexico had exclusive jurisdiction to issue the Initial Mexico Order because it was the home state of the child. When determining if a foreign order is in substantial conformity with the UCCJEA, an

Arizona court must examine the *factual* circumstances under which the foreign court exercised jurisdiction, not the *legal* circumstances. The factual circumstances complied with the UCCJEA jurisdictional requirement that is based on where the child is living (see history in the 2016 case analysis).

Chapter 3: In 2018, the Mexico Supreme Court Vacates the Initial Mexico Order Putting Jurisdiction Back in Arizona. The Mexico Trial Court then Ordered the Child to be Returned to Arizona; However, in 2019, Another Mexico Court Enjoined the Child's Removal from Mexico

In 2018 the Supreme Court of Mexico decided that Mexico had no authority to issue the Initial Mexico Order granting custody in Father because it was contrary to the court's finding in the Hague Convention action that the child was a habitual resident of the U.S. ("Second Mexico Order"). It observed that the child should be returned to Mother in Tucson during the pendency of the custody case in Tucson. In March of 2019, the Mexico trial court ordered the child to be returned to the United States. But then in November 2019, Father notified the Pima County Superior Court that another court in Mexico enjoined the child's removal from Mexico.

Chapter 4: In 2019 the Arizona Trial Court Refuses to Recognize the Second Mexico Order Claiming that It was Not in Compliance with the UCCJEA, Thereby Tossing Jurisdiction Back to Mexico. Division Two Reverses and Finds that the Second Mexico Order Abdicating Jurisdiction was Valid– Jurisdiction is Back in Arizona

In 2019, the Pima County Superior Court determined that the Second Mexico Order was not entitled to full faith and credit because it was not in compliance with the UCCJEA; instead its decision was rooted in the findings made in the Hague Convention case. If upheld, that decision would have put jurisdiction back in the Mexico Court with custody in Father. On appeal, Division Two reversed, effectively giving full faith and recognition to the Mexico Supreme Court's decision **not** to exercise home state jurisdiction and deferring to Arizona. Division Two reasoned that Mexico **effectively** declined jurisdiction, even though it relied on Hague Convention grounds. The fact that its order did not comply with the findings and language of the UCCJEA was irrelevant. Mexico is not required to follow a law that it has not adopted.

It was undisputed that the child had not lived in Arizona during the last five years, and that the child did not have significant connections with Arizona. However, that fact is irrelevant where it is clear from the facts that the home state declined jurisdiction; and there is no other home state. Arizona properly exercised jurisdiction because no court would be able to exercise jurisdiction under these circumstances.

So stay tuned. This was remanded back to Pima County to make a custody determination.

In re the Marriage of ***Margain and Ruiz-Bours,*** 251 Ariz. 122, 485 P.3d 1079 (Div. 2, March 30, 2021); Continuation of ***In re Marriage of Margain & Ruiz-Bours***, 239 Ariz. 369 (Div. 2, April 22, 2016).

> [**EDITOR'S NOTE:** the Mexico Court did not appear to rely on *forum non conveniens*; Arizona courts can refuse to enforce a foreign custody order if the law of that country violates fundamental principles of human rights; however, neither party raised the comity issue.]

For the history buffs among you:

4. 2016 *MARGAIN* DIVISION TWO APPEAL: MEXICO CUSTODY ORDER WAS ENTITLED TO FULL FAITH AND CREDIT IN ARIZONA WHERE THE FACTUAL, NOT NECESSARILY LEGAL, CIRCUMSTANCES WERE IN SUBSTANTIAL CONFORMITY WITH THE JURISDICTIONAL STANDARDS OF THE UCCJEA

Mother and Father married in Mexico, then moved to the U.S., where their daughter was born. Mother and child left California for Hermosillo, Mexico, when she was two years old and stayed for two years. Father brought a dissolution action in Tijuana, Mexico, asserting abandonment. Mother challenged jurisdiction in the Mexico Court, claiming Hermosillo was the proper venue. However, the Supreme Court of Mexico confirmed jurisdiction in Tijuana. Mother absconded with the child to Tucson. The Tijuana court later issued a final judgment awarding Father custody ("Initial Mexico Order"). Mother did not appeal the Initial Mexico Order.

In Arizona, Mother filed a petition for physical custody. The Arizona Court ordered that neither parent remove the child from Arizona until it resolved jurisdiction. Jurisdiction in Arizona pivoted on whether Mexico exercised jurisdiction in substantial conformity with the UCCJEA. Arizona answered "no" – because jurisdiction in Mexico was not based on where the child was living. Mother was eventually awarded attorneys fees. Father appealed both the decision and the award of fees in Arizona. Pending appeal and against the order of the Arizona court, Father failed to return the child from Mexico after a scheduled visit. Mother moved to dismiss Father's appeal for contempt.

Division Two considered dismissal of Father's appeal based on his contempt, but found Mother had unclean hands (for absconding with the child to Arizona). Division

Two, however, reversed the trial court by finding that Mexico had exclusive jurisdiction and the Initial Mexico Order was valid and binding.

When determining if a foreign order is in substantial conformity with the UCCJEA, an Arizona court must examine the *factual* circumstances under which the foreign court exercised jurisdiction, not the *legal* circumstances. While the Mexico court based jurisdiction on the location of the child's abandonment, this was also the location of the child; therefore, the factual circumstances complied with the UCCJEA requirement of the jurisdiction being based on where the child was living. Because the Court reversed the trial court ruling, it also reversed the fees order. ***In re the Marriage of Margain and Ruiz-Bours***, 251 Ariz. 122, 485 P.3d 1079 (Div. 2, March 30, 2021);.

5. *GREENBANK*: § 25-1032(A)(2) THE UCCJEA REQUIRES ARIZONA TO DIVEST ITSELF OF JURISDICTION ONCE A FOREIGN COURT ASSUMES JURISDICTION AND NEITHER THE CHILD NOR A PARENT OR PERSON ACTING AS A PARENT LIVES IN ARIZONA; STATUTE CREATES NO EXCEPTION FOR A GRANDPARENT WITH AN ARIZONA VISITATION ORDER WHO CONTINUES TO RESIDE IN ARIZONA

At the time the divorce was filed, Arizona was the Child's home state under the UCCJEA. In 2012, the Arizona court entered the Visitation Agreement granting the paternal Grandmother visitation privileges with Child. Mother moved with the child to Canada, then repeatedly and blatantly violated the Agreement. In 2019, Mother obtained a Canadian Court order modifying the Agreement. The Canadian court did not consult with the Arizona court.

Arizona concluded that under the UCCJEA, A.R.S. § 25-1031, the Canadian court's order automatically divested Arizona of exclusive, continuing jurisdiction. It quashed the outstanding civil arrest warrant against Mother and dismissed the Arizona proceeding with prejudice. Grandmother appealed.

Division One affirmed, reasoning that §25-1032(A)(2) divested Arizona of jurisdiction. No one disputed that neither the child nor the parents had lived in Arizona for more than seven years. While the Grandmother continued to live in Arizona, she did not qualify as a parent or a person acting as a parent. Consequently, Grandmother's residence does not change the result under §25-1032(A)(2). While this interpretation may contradict the UCCJEA's spirit and purpose, it reflects a plain reading. While a substantial connection to Arizona might have been relevant for a parent, the statute grants no such jurisdictional protections for grandparents.

Division One acknowledged that the UCCJEA contemplates, encourages, and – in some instances, requires – communication and consultation between courts, it appeared that neither party requested such communication. Although under A.R.S. §25-1057 an Arizona court must communicate with a foreign court before dismissing an Arizona proceeding, it must do so only if the Arizona court knew of the Canadian court proceedings. Both parties had a duty to notify the Arizona court of such proceedings.

Although the Court of Appeal acknowledged the unfairness of Mother's blatant evasion of court orders, its hands were tied because the UCCJEA excludes grandparents. Arizona did, however, award fees to Grandmother based on a variety of grounds.

Greenbank v. VanZant; 250 Ariz. 644, 483 P.3d 266 (Div. 1, Filed March 9, 2021).

6. ***OLESEN*: COURT MUST MAKE SPECIFIC FINDINGS AS TO WHETHER A PARENT WHO COMMITTED AN ACT OF DOMESTIC VIOLENCE FAILED TO REBUT THE PRESUMPTION AGAINST GRANTING THAT PARENT LEGAL DECISION-MAKING AUTHORITY; UNLIKE SUBJECT MATTER JURISDICTION, VENUE IS WAIVEABLE; ALTHOUGH ISSUE PRECLUSION PREVENTS A PARTY FROM RE-LITIGATING A PRIOR COURT ORDER FINDING DOMESTIC VIOLENCE, PARTY CAN OFFER EVIDENCE THAT THERE HAS BEEN A SUBSTANTIAL CHANGE OF CIRCUMSTANCES**

The trial court awarded sole legal decision-making authority and parenting time to maternal grandparents. The Court granted Father only four hours of supervised parenting time each month at the Child's counselor's discretion. Father appealed arguing: (1) lack of subject-matter jurisdiction under A.R.S. §25-402(B)(2) because the action was filed in Yavapai County even though the Child was a permanent resident of Mohave County; and (2) that the Court did not make specific findings as to whether Father rebutted the presumption under A.R.S. §25-403.03(E) that due to Father's domestic violence, it was contrary to the Child's best interests that Father exercise decision-making. Division One held:

- **Subject Matter Jurisdiction.** Subject matter jurisdiction refers to its "statutory or constitutional authority to hear a certain type of case." It cannot be waived and it can be raised at any stage of the proceedings. A.R.S. §25-311(A) grants the superior court jurisdiction to hear all matters relating to legal decision-making and parenting time, which is precisely what the trial court did here. The superior court is one unified trial court of

general jurisdiction. Accordingly, the trial court had subject matter jurisdiction.

- **Venue.** A.R.S. §25-402(B)(2) creates a venue requirement. A petition for third party rights under A.R.S. §25-409 must be filed in the county in which the child permanently resides. It does not restrict the superior court's **jurisdiction**. Venue can be waived. Father failed to raise this issue in the superior court; and, therefore, waived it.

- **Specific Findings Required for Domestic Violence.** The superior court must **make specific findings** as to whether a parent who has committed an act of domestic violence failed to rebut the presumption against granting that parent legal decision-making authority. A.R.S. §25-403(B). These findings cannot be inferred just because the court rejected Father's request for legal decision-making. ***(DeLuna v. Petitto***, 247 Ariz. 420, 423 (App. 2019) [the Court imposed the specific finding requirement where the court **awarded legal decision-making to the parent** who committed domestic violence]. The court must also make specific findings to deny legal decision-making to the parent who committed domestic violence.

- **Issue Preclusion.** Father's due process rights were not violated when the Court refused to let him challenge the factual bases underpinning prior court orders finding domestic violence. Issue preclusion (collateral estoppel) bars litigation over the prior court findings because: (1) the matter was actually litigated; (2) a final judgment was entered; and (3) the party against whom the doctrine is to be invoked had a full opportunity to be heard.

- **Change of Circumstances.** An offending parent can present evidence of a change in circumstances. The Arizona supreme court has established such a rule to apply *res judicata* for parenting issues ***Ward v. Ward,*** 88 Ariz. 130 (1960). If it finds a change, the court must then make specific findings regarding whether the parent's new evidence rebuts the presumption.

- **Burden of Proof.** If Father can rebut the presumption, the burden shifts to the Grandparents to show by clear and convincing evidence that it is not in the Child's best interests for Father to be awarded legal decision-making authority.

[**EDITOR'S NOTE:** As to the court's order awarding Father only four hours of supervised parenting time each month at the Child's counselor's discretion, the Court wrote this footnote: citing ***Nold v. Nold,*** 232 Ariz. 270 (App. 2013) and other cases, the court "can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment. The best interests of the child...are for the superior court alone to decide." Although worthy of a footnote, it did not appear to factor into Division One's decision to reverse and remand).

Olesen v. Daniel/Burge et al., 251 Ariz. 25, 484 P.3d 139 (Div.1, March 11, 2021), as amended (Mar. 12, 2021)

7. *BRACKEEN/HAALAND*: FIFTH CIRCUIT: STRIKES DOWN PARTS OF THE ICWA

The Fifth Circuit has struck down parts of the Indian Child Welfare Act. The 325-page opinion (which will **not** be summarized here) showed the court to be sharply divided on the constitutionality of requiring Native American children to be adopted by Native families or placed in homes approved by an Indian tribe. Pre-ICWA, evidence showed that state adoption standards resulted in the breakup of American Indian families. With multiple partial dissents and partial concurrences, the opinion is not precedential on all issues - but the holding that Native placements are unlawfully discriminatory earned a sharp rebuke from advocates for indigenous communities. Critics say that will undermine the preservation of Native families and culture.

Brackeen v. Haaland (formerly ***Brackeen v. Bernhardt***), No. 18-11479 (5th Cir. April 6, 2021).

8. ***BACKSTRAND:*** **COURT MAY MODIFY A PARENTING PLAN ONLY IF IT FIRST FINDS A MATERIAL CHANGE OF CIRCUMSTANCES *AFFECTING THE CHILD'S WELFARE* SINCE THE LAST COURT ORDER; IF IT MAKES THIS FINDING, THEN THE COURT MAY DETERMINE WHETHER A CHANGE IN THE PARENTING PLAN WILL BE IN THE CHILD'S BEST INTERESTS; THE MATERIAL CHANGE DOES NOT HAVE TO BE *DETRIMENTAL* TO THE CHILD'S WELFARE; THE TRIAL COURT DID NOT DENY DUE PROCESS TO A PARTY BY IMPOSING REASONABLE TIME LIMITS**

Decree and parenting plan were entered in 2017. While the dissolution was pending, Father moved to Minnesota. The Plan provided two alternatives for parenting time depending on whether or not Father stayed in Minnesota (Mother would have primary parenting time) or moved back to Arizona (equal parenting time). Either way, the child would reside in and attend school in Arizona. After the Decree was entered, Mother notified Father that she was moving to Las Vegas with the child. Father filed for emergency relief to enjoin relocation. The Court denied Father's request.

Mother moved, and Father requested a modification of legal decision-making and parenting time. After a hearing, the court concluded that Mother created a substantial and continuing change that *affected the child's best interests*. Therefore, it needed to analyze best interests under A.R.S. §25-403.

The court concluded it was in the child's best interests for Father to be her primary residential parent in Minnesota and granted Mother liberal parenting time. Mother appealed, arguing that the Court could not modify parenting time unless it first found a material change detrimental to the child's welfare. Division One rejected this argument, citing ***Black v. Black***, 114 Ariz. 282, 283 (1977). These are the rules:

- **Two-Step Inquiry Required.** Before modifying a decree's decision-making and parenting-time provisions, the court must engage in a two-stage inquiry: First, it must decide if there has been a *material change of circumstances* since the last court order that *affects the welfare of the child.* Second – and only then – may the court determine whether a change in custody will be *in the best interests of the child*. The burden is on the moving party to satisfy the court that the circumstances have materially changed (i.e. whether the change justifies departing from the principles of *res judicata* underlying the order currently in place). In other words, the change of circumstances acts to limit the circumstances under which a decree can be modified and is one aspect of *res judicata*.

- ***Davis* Distinguished.** Mother argued that ***Davis v. Davis**,* 78 Ariz. 174, 176 (1954) requires the court to find that the alleged change of circumstances are both **substantial and detrimental** before it may consider changing the parenting plan. Because she could show that the move was beneficial, the Court could not modify the parenting plan. Division One acknowledged that ***Davis*** did not specifically reference the two distinct stages of the modification inquiry, but as a practical matter, it did follow this principle. Division One concluded that the change of circumstances need only be substantial and that it *affects* the child's welfare before it can modify custody, at which time the modification must be based on the *child's best interests*.

- **Change in Circumstances that Reduces the Effect of a Parenting Plan Provision is Material.** A Parenting Plan represents a snapshot of the child's best interests. The Plan forms the baseline for future assessment of whether a substantial change has occurred. That is one reason that §25-403 requires specific findings on the record. A change that materially reduces or eliminates the effect of a parenting-plan provision constitutes a substantial change of circumstances because that provision no longer advances the child's best interests.

- **Change of Circumstances Factors Relevant to, but not Dispositive of Best Interests Analysis.** While the factors that establish a change of circumstances are not always completely dispositive of what will be in the child's best interests, they are highly relevant.

- **Circumstances Existing Prior to the Last Court Order Cannot Establish Material Change, but Are Relevant to Best Interests.** Mother contended that the court could not consider the presence of the child's extended family in Minnesota because that fact already existed when the original decree was entered. While Mother was correct that the allegation of a material change must occur after the last court order, once the court found that the relocation caused a material change of circumstances affecting her welfare, it was statutorily required to consider **all** factors, including presence of significant persons in the child's life.

- **Moral of the Story: Affirmatively Seek Court Authorization to Relocate Before Relocating.** Had Mother sought the court's authorization to relocate *before* she moved to Las Vegas, the outcome may have been

entirely different. A proposed relocation, by itself, does not constitute a material change of circumstances affecting the child. If the residential parent is willing to remain in the state if relocation is not granted, there is no basis to modify any provision of the Decree.

- **Court Time and Due Process.** Mother argued that she was denied due process because the court allowed Father 2.5 days to present his case, but limited her case to only 50 minutes. The court acknowledged that the touchstone of due process is fundamental fairness. At a minimum, due process requires that litigants be heard at a meaningful time and in a meaningful matter. But it has to be balanced against the superior court's broad discretion to impose reasonable time limits and control the management of its docket. Here, due process was served. Mother's counsel was allowed extensive cross-examination of Father's witnesses. The court then extended the trial by nearly a full day without objection. Mother's counsel again used this time to conduct extensive cross-examination and granted Mother an additional 50 minutes for her case. Additionally, the court noted that Mother's counsel did not renew the time objection or specify what other evidence was needed to present Mother's case adequately, nor does Mother identify any evidence that she was not able to present due to lack of time.

Backstrand v. Backstrand, 250 Ariz. 339, 479 P.3d 846 (Div.1, Dec. 24, 2020).

9. ***BALL:*** **FIRST AMENDMENT ECCLESIASTICAL-ABSTENTION DOCTRINE PROHIBITS COURT FROM CONSIDERING WHETHER THE CHURCH THAT FATHER ATTENDED WAS PART OF THE CHRISTIAN FAITH**

The Parenting Plan stated, "Each parent *may* take the minor children to a church or place of worship of his or her choice during the time that the minor children are in his or her care"; and "Both parents agree that the minor children *may* be instructed in the Christian faith". About a year after the divorce, Father joined The Church of Jesus Christ of Latter-day Saints and the children sometimes went with him. Mother filed Petition to enforce the Parenting Plan and argued that the LDS church is not part of the Christian faith. The trial court held that Father's church was not Christian and that Father could not take the children there. Division One reversed:

- **Language of the Parenting Plan was Permissive.** The second line of the parenting plan did not narrow the first - either parent ***may*** take the children to a place of worship of their choice, regardless of whether it was Christian.

The Court found a significant distinction in being instructed in the Christian faith and attending places of worship of the parent's choosing.

- **Ecclesiastical Inquiries are Verboten.** The trial court violated the First Amendment of the U.S. Constitution when it ruled that the LDS Church is not Christian. The Court noted that the issue could have been resolved on non-constitutional grounds - had the trial court correctly interpreted the language of the parenting plan initially, there would have been no need to reach this issue. The Court explained that the trial court never should have engaged in analysis of what is Christian. The "ecclesiastical-abstention doctrine" precludes Courts from "inquiring into ecclesiastical matters". The trial court did not resolve the issue through legal principles, but instead heard evidence about the religious doctrines at issue which is a violation of the doctrine.

- **Be Specific in the Parenting Plan.** The Court issued this warning: "But parents who wish to address aspects of their children's religious education in a parenting plan should take great care to ensure those provisions are as specific and detailed as possible. Failure to do so may impermissibly entangle the court in religious matters should a dispute ever arise. This case provides a potent example of this possibility made real. The ambiguities surrounding the phrase 'the Christian faith' thrust the court directly into a matter of theological controversy in which it could not take part."

Ball v. Ball, 250 Ariz. 273, 478 P.3d 704, (Div. 1, December 10, 2020).

10. *McLAUGHLIN/SWANSON*: COURT CAN CHANGE BIRTH CERTIFICATE TO IDENTIFY BOTH THE BIO MOTHER AND LEGAL MOTHER AS "MOTHER"; COURT IS NOT LIMITED BY ADHS REGULATIONS AS TO BIRTH CERTIFICATE FIELD IDENTIFIERS

In prior appeal, Arizona Supreme Court ruled that presumption of legal parentage applies to same-sex marriages. Almost of all of the case settled after remand, except for the issue of how the Legal Mother's parentage would appear on the birth certificate. Bio-mom wanted the birth certificate to list her as Mother and the legal Mother as a Legal Mother or Parent. The Legal Mother wanted both parties to be listed as Mother; however, the birth certificate form only permitted a "mother-father" or "parent-parent" option. Legal Mother was willing to settle for "parent-parent". The trial court ruled it did not have authority to change the birth certificate (under Arizona Department of Health and Human Services rules) to "mother-mother"; instead, it changed it to "parent-parent".

Biological mother appealed, arguing that the 14th Amendment prevents her from being stripped of her title as "Mother". The Court did not rule on the constitutional issue.

Division Two ruled that the trial court *does have the authority* to change a birth certificate because birth certificates can be changed by court order. Accordingly, the case was remanded to the trial court to exercise its statutory authority and order the amendment of the birth certificate it deems most appropriate in the circumstances of this case, in which the child has two female parents.

> ***In re Marriage of McLaughlin and Swanson***, 250 Ariz. 156, 476 P.3d 336 (Div. 2, October 5, 2020).
>
> [**EDITOR'S NOTE:** In a footnote, Division Two essentially directed the trial court on how to rule.]

11. *GONZALEZ-GUNTER*: THE COURT IS NOT REQUIRED TO EQUALLY DIVIDE PARENTING TIME ABSENT A FINDING OF UNFITNESS OR ENDANGERMENT; THERE IS NO STATUTORY PRESUMPTION OF EQUAL PARENTING TIME

Father and Mother shared equal parenting time and joint legal decision making pursuant to a Consent Decree. No child support was ordered. Two years later, Mother requested a modification of the parenting and child support orders. Mother alleged that Father had abused drugs and emotionally and verbally abused the children. Mother also requested a court order for Father to undergo drug testing. Father's hair follicle test was negative; however, the Court Appointed Advisor (CAA) recommended that Mother be designated as primary residential parent; that Father take a parenting skills course; and both parents enroll in a high conflict resolution class. CAA expressed concern about Father's lack of engagement with the children and his sensitivity to their needs. Additionally, Father allowed his negative feelings towards Mother to interfere with his ability to co-parent.

After an evidentiary hearing, the Court made relevant best-interests findings under §25-403(A), designated Mother as primary residential parent and reduced Father's time. Father's appeal was denied based on the following reasoning:

> **Equal Parenting Time is not a Statutory Presumption.** A.R.S. §§25-403.02, 25-103(B)(1), and 25-411(J) do not require the family court to equally divide parenting time unless it finds parental unfitness or endangerment. Though as a general rule equal or near-equal parenting time is presumed to be in a child's best

interests, the family court has discretion to determine parenting time based on all the evidence before it.

§25-411(J) Permits the Court to Reduce Parenting Time Without Finding that Parenting Time Would Endanger the Child. The Court of Appeals rejected Father's contention that A.R.S. §25-411(J) permits the family court to reduce a parent's allotted time with a child only if it finds that "parenting time would endanger" the child. The statutory limitation on the court's power does not apply to a diminution in parenting time, but refers to the court's power to place conditions on how a parent may exercise his or her "parenting time rights," such as by limiting the manner that parenting time is exercised.

Gonzalez-Gunter v. Gunter, 249 Ariz. 489, 471 P.3d 1024 (Div. 2, July 23, 2020), as amended (Aug. 14, 2020).

12. *IN RE M.G.*: WHEN CHILD'S ONLY LIVING PARENT DIES, PARENTAL RIGHTS ARE TERMINATED FOR PURPOSES OF A.R.S. § 14-5204, ALLOWING APPOINTMENT OF GUARDIAN

When a child's only living parent dies, parental rights are terminated for purposes of A.R.S. § 14-5204, which provides a basis for an assertion of authority under that statute to appoint a guardian for the child. The trial court had denied the guardianship petition, concluding that, because a guardianship proceeding requires parental notice, such proceedings are not an option for a child whose only living parent has died. But the Court of Appeals noted that Mother's parental rights terminated when she died, thereby satisfying § 14-5204's condition that "all parental rights of custody have been terminated." Therefore, the court could appoint a guardian upon determining that the requirements of A.R.S. §14-5207(B) were met.

In Re M.G. and R.G. 481 P.3d 1176 (Div. 1, February 9, 2021).

PATERNITY

13. *COX/PONCE*: THE REQUIREMENT THAT FATHER FILE PATERNITY ACTION WITHIN THIRTY DAYS OF RECEIVING MOTHER'S NOTICE OF ADOPTION PROCEEDINGS OR TERMINATION OF PARENTAL RIGHTS CANNOT BE WAIVED EVEN BASED ON EQUITABLE DEFENSES BECAUSE A.R.S. 8-106(G)(J) IS A STATUTE OF REPOSE, NOT A STATUTE OF LIMITATIONS

The baby was conceived in 2018, then the parties lived together. In 2019, Mother moved out. Father retained an attorney and filed a claim of paternity with the putative father's registry pursuant to A.R.S. § 8-106.01

On August 27, Mother served Father with an adoption notice, and Father's attorney accepted service. The notice contained a warning that Father would have to initiate paternity proceedings and serve Mother within 30 days. The baby was born on September 14.

Father's attorney's paralegal sent a letter to the Adoptive Couple's attorney stating that Father would be asserting parental rights. In one huge and irredeemable "oops", the paralegal failed to calendar the deadline to file the paternity action.

On October 11, Father filed his paternity action. Mother and Adoptive Couple filed a Motion to Dismiss, which was granted. Division One declined special action jurisdiction. In this matter of first impression, the Supreme Court granted review and affirmed the dismissal holding as follows:

1. A.R.S. § 25-804 requires the trial court to dismiss any proceeding that is barred by A.R.S. § 8-106(J). In addition ARFLP Rule 40(j) requires dismissal of any proceeding barred under A.R.S. § 8-106(J). Whether principles of equity (*e.g.*, excusable neglect and equitable tolling) apply to provide relief depends on the nature of the statute as a statute of limitations versus a statute of repose.

2. A statute of limitations identifies the outer limits of the period of time within which an action may be brought to enforce legal rights. A statute of repose (non-claim statute) acts to extinguish an action if rights are not enforced within a specific deadline. While both statutes act as deadlines, equitable principle may provide relief only from deadlines imposed by a statute of limitations. A statute of repose may not be tolled, even in cases of extraordinary circumstances beyond a person's control.

3. Statutes of limitation are procedural and constitute a personal privilege, which a party may waive; and are subject to equitable tolling; a statute of repose may not be waived and is not subject to tolling because it defines a substantive right. It establishes a condition precedent to enforcement of a right.

4. This interpretation is consistent with Arizona's strong public policy favoring finality in adoptions.

5. Although the Supreme Court acknowledged sympathy for the Father, its hands were tied. The Court will not recast a statute under the guise of interpreting it to avoid an unpleasant result because such action would do violence to the law itself. The remedy lies with the legislature.

Cox v. Ponce in & for Cty. of Maricopa, No. CV-20-0173-PR, 2021 WL 3137714, ___ Ariz. ___ (Ariz. Ct. App. Div. 1 July 26, 2021).

14. *RICHARD M.*: FAILURE TO INITIATE PATERNITY PROCEEDINGS WITHIN THIRTY DAYS OF A NOTICE OF ADOPTION PRECLUDES FATHER'S RIGHTS

The court terminated the parental rights of a potential and putative father to a minor child. The court correctly denied his request to be heard at or otherwise participate in the best-interests portion of the termination hearing because he failed to initiate paternity proceedings within 30 days of receiving notice of a planned adoption as is required by A.R.S. §§ 8-106(G)(7) and 8-106.01(G). Because the putative father failed to comply with statute, his interests are as a putative and potential father, not the more expansive rights of an actual father.

Richard M. v. Patrick M., 248 Ariz. 492, 462 P.3d 569 (Div. 1, April 01, 2020).

[PRACTICE TIP: If ***In Re Mother Goose*** was not a big enough lesson, this should drive the point home! There are strict time limits on initiating paternity proceedings and on registering with the Child Registry.]

15. ***McQUILLEN:*** **VOLUNTARY ACKNOWLEDGMENT OF PATERNITY HAS SAME FORCE AS A COURT JUDGMENT; IT TRUMPS ALL OTHER PATERNITY PRESUMPTIONS IDENTIFIED IN A.R.S. §25-812(A)**

In January 2016, Father voluntarily acknowledged paternity of Child. Both parents signed a form issued by ADES entitled "Acknowledgment of Paternity" ("Acknowledgment") that identified the Voluntary Father as Child's Father, which was submitted to ADES. ADES then amended the Child's birth certificate to reflect Voluntary Father as the Child's father and to change of Child's last name.

In October 2017, Mother filed a paternity petition to establish another man, "Hufford", as the child's biological father and she asked for child support and parenting orders. Genetic testing confirmed that Hufford was the Child's biological father. Hufford moved for summary judgment arguing that Mother was precluded from filing a paternity claim against him because Child already had a legal father. Mother asked the court to set aside the Acknowledgment on the grounds of fraud and apply a presumption of paternity in favor of Hufford based on the genetic test results. The trial Court granted Hufford's motion. On Appeal, Division One affirmed the trial court. In doing so the Court reconciled A.R.S. §25-812 (the statute that provides for an Acknowledgment of Paternity) and §25-814 (the statute that sets out the presumptions of paternity) as follows:

- **Statutes Must be Read Together.** The goal of statutory interpretation is to effectuate the legislature's intent. The best indicator of that is the statute's plain language. When statutes related to the same subject or have the same general purpose, they should be read together as one law.

- **Paternity Acknowledgment Equal to Other Statutory Proof of Paternity.** §25-812 (D) provides that an Acknowledgment has the same force and effect as a superior court judgment. Any uncertainty about the effect of an Acknowledgment is resolved by the legislature's directive that "a court decree establishing paternity of the child by another man rebuts the presumption." A.R.S. §25-814.c. Because an Acknowledgment has the same force and effect as a superior court judgment, it qualifies as a court decree establishing paternity for the purposes of §25-814.c. Accordingly, the legislature unambiguously expressed a preference for finality in paternity determinations that trumps any weighty considerations of policy and logic.

- **Other §25-814 Presumptions of Paternity are Subordinate to an Acknowledgment.** Other presumptions of paternity contained in A.R.S. §25-814 are subordinate to the voluntary establishment of paternity governed by §25-812.

- **Acknowledgment Must Be Filed.** The above interpretation does not make §25-814(A) meaningless. The mere execution of an Acknowledgment does not create a judgment; the Acknowledgment must be filed with the state- through the clerk of the superior court, ADES or ADHS - before it establishes paternity with the same force and effect as a court order.

- **An Acknowledgment is presumed valid and binding unless proved otherwise.** Once the 60 day period to rescind an Acknowledgment has expired under §25-812(H)(1), it may be challenged only for fraud, duress or material mistake of fact. ARFLP Rule 85(b). The challenger bears the burden of proof. Such relief is never available to someone who has knowingly participated in the fraud, which Mother perpetrated here.

- **Mutual Rescission of Acknowledgment After Deadline is Prohibited.** The Mother and Voluntary Father cannot simply stipulate to rescind the Acknowledgment. §25-812(H) specifically limits the time for rescission.

- **Every Paternity Presumption is Rebuttable. If Presumptions Conflict, the Court Weighs Policy and Logic.** One of the presumptions for paternity under §25-814(A)(2) is genetic testing establishing 95% or more probability of paternity. Another presumption for paternity under A.R.S. §25-814(4) is an Acknowledgment. Any presumption shall be rebutted by clear and convincing evidence. If two or more contradictory presumptions apply, weightier considerations of policy and logic determine which presumption controls.

- **BUT and here is the Kicker: Although §25-812(E) directs genetic testing and requires an Acknowledgment be vacated if the court finds by clear and convincing evidence that the genetic tests demonstrate that the Voluntary Father is not the biological parent, the statute's provisions must be read together.** By its plain language, §25-812(E) requires genetic testing only **after** the court finds that a party has shown

fraud, duress or material mistake of fact sufficient to upset the Acknowledgment.

In re McQuillen v. Hufford, 249 Ariz. 69, 466 P.3d 380 (Division 1, April 30, 2020), review denied (Jan. 5, 2021).

[**EDITOR'S NOTE:** Under this same logic, Voluntary Father would not be precluded from challenging an Acknowledgment for fraud as he did not participate in the fraud. One would think that he would be an indispensable or necessary party. However, there is no explanation of Voluntary Father's role in this proceeding. Presumably, he was not challenging his status.]

[**SECOND EDITOR'S NOTE:** Had the court found fraud, then presumably genetic testing would be a viable presumption that must be weighed against the Acknowledgment presumption. A.R.S. §25-814.c states that if two or more presumptions apply, the presumption that the court uses, on the facts, is based on weightier considerations of policy and logic will control.]

16. ***DOHERTY:*** **WHERE THERE ARE TWO COMPETING PATERNITY PRESUMPTIONS, THE COURT MUST CHOOSE ONE BASED ON THE WEIGHTIER CONSIDERATIONS OF POLICY AND LOGIC; EQUITABLE ESTOPPEL CAN PRECLUDE A PARENT FROM ESTABLISHING A PRESUMPTION; BIOLOGICAL FATHER DID NOT AUTOMATICALLY ESTABLISH HIS PARENTAL RIGHTS; RATHER, HE WAS REQUIRED TO TAKE LEGAL STEPS TO ESTABLISH A PARENT-CHILD RELATIONSHIP BEFORE HE WOULD BE ENTITLED TO CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS**

Bio-Father (Ray) donated his sperm to Bio-mother (Giovanah) and her then girl-friend (Dominique). The parties had an oral agreement that Ray would not have any parental rights and he would not be required to pay child support. Giovanah and Dominique married in January 2016. Giovanah gave birth in April 2016. Dominique was named on the birth certificate as the second parent. In the meantime, Dominique and Giovanah lost contact with Ray; Giovanah was incarcerated; and Dominique became the sole caregiver. In May of 2017, Dominique and Giovanah had a falling out and Dominique resumed extensive contact with Ray, who pledged to help Dominique maintain her parental rights. In January 2018, Ray obtained a DNA blood draw from the child without Dominique's knowledge. He also reported Dominique to DCS, and those allegations were dismissed. That was the end of the Ray/Dominique liaison. Ray then filed for paternity, legal decision making, parenting time, and child support. After a

hearing, the court denied Ray's legal parentage claim based on a genetic presumption. Ray appealed. These are the take-home points:

- **Four Presumptions of Parenthood.** There are four presumptions of parenthood under A.R.S. §25-814 (A): (1) marriage within ten months of birth (marital presumption); (2) genetic testing; (3) birth certificate signed by mother and father of a child born out of wedlock; and (4) an Acknowledgment.

- Dominique established the **marital presumption** (relying on the ***McLaughlin*** case– the presumption of paternity statute applies to same sex marriages). This marital presumption applies even where the child is conceived by artificial insemination – the court cannot presume limitations that the legislature did not expressly state.

- Ray established the **genetic presumption** under §25-814(A) (2). Constitutionally, the genetic-testing presumption does not trump the marital presumption. Instead, parents with an existing parental relationship, receive the highest constitutional protection. A putative bio-father, however, must ***first*** take steps to ***establish*** a parent-child relationship before being accorded that constitutional protection. A bio-father who is not married to the bio-mother has no immediate right to custody or duty of support unless paternity is judicially established. Accordingly, the court did not sever Ray's parental rights– he just failed to establish them in the first place.

- **There is no hierarchy of presumptions.** A.R.S. §25-814.c. If two or more presumptions apply, the court determines the issue based on **weightier considerations of policy and logic.**

- **Here, Public Policy Favored the Marital Presumption.** The trial court found that because both Giovanah and Dominique expressed a desire to raise the child together as married couple, as well as to work on their marriage, public policy favored giving additional weight to the marital presumption. Despite Ray's financial stability, Dominique had always provided a portion of the financial support, aspired to increase her education to better provide for the child in the future, and both mothers had supportive families. Nor was it realistic to expect the parties to co-parent as they had never been a family unit and had no commonality or relationship. It was, therefore, in the best interests of the child that the **marital**

presumption control because it would permit Dominique, the "parent with the strongest history with the child," to have parental rights.

- **§25-814.c does not expressly require a best interests finding under §25-403.** Because the court denied Ray's claim for paternity, §25-403 was not implicated.

- ***Equitable estoppel*** precludes a party from asserting a right inconsistent with a position previously taken to the prejudice of another acting thereon. It requires: (1) conduct that induces another to believe in certain material facts; (2) acts resulting in justifiable reliance on the inducement; and, (3) injury caused by the resulting acts. Nothing prohibits Arizona courts from applying equitable estoppel to preclude the rebuttal of a statutory paternity presumption under §25-814(A). The trial court correctly decided that Ray was barred by equitable estoppel from asserting parental rights. He agreed to donate sperm with the understanding he would not have any parental rights; he took no action to assert parental rights until more than two years after the child's birth; he did not register on the Arizona Putative Father's Registration; and he did not provide any child support. Both Dominique and Giovanah relied profoundly on their understanding that they were the child's parents, not Ray. If Ray were not precluded from repudiating his prior position, "Dominique will suffer injury by losing her position as a parent and her claim to legal decision-making and parenting time."

- **There is no "opt-in" requirement (that a bio-father establish his rights by written agreement) and the court did not impose one. However, Ray's status as the biological father did not automatically establish his parental rights.** He was required to take legal steps to establish a parent-child relationship before he would be entitled to constitutionally protected parental rights, citing ***Pima County,*** No. S-114487, 179 Ariz. at 94.

Doherty v. Leon, 249 Ariz. 515, 472 P.3d 531 (Div. 2, July 28, 2020).

RELOCATION

17. *LAYNE/LABIANCA:* COURT MUST CONSIDER RELOCATION STATUTE FACTORS BEFORE ISSUING TEMPORARY ORDER PERMITTING RELOCATION; DETAILED WRITTEN FINDINGS REGARDING EACH FACTOR IS UNNECESSARY FOR TEMPORARY ORDERS

On December 2, 2019, Mother left Arizona with the parties' infant to visit her family in Ohio. Mother failed to return as scheduled. Father filed an emergency motion for temporary orders and asked the court to grant him sole legal decision making authority and to be designated as the primary parent. The court granted the emergency motion and scheduled a hearing. At that hearing, the parents agreed to equally divide parenting time and share joint decision-making until the next court hearing. Prior to the entry of the Decree, Mother petitioned for relocation. After the temporary relocation hearing, the court granted Mother sole legal decision-making authority, named her as the primary residential parent, authorized her relocation to Ohio and granted Father up to three days of parenting time in Ohio. The court also found that Father made material misrepresentations to the Court. Although the court considered §25-403 (best interest factors), it did not mention or expressly consider the factors in §25-408(I). Father appealed.

Citing ***Woyton***, Division 1 held that the court must consider the factors set forth in §25-408(I) whenever it authorizes relocation in addition to best interest factors. Because of the nature and sheer volume of temporary orders on which the family division rules, however, **the court need not make detailed findings**. Accordingly, the Court vacated and remanded, noting that Mother has the burden of proof to show that relocation is in the child's best interests.

> ***Layne v. LaBianca in & for Cty. of Maricopa,*** 249 Ariz. 301, 468 P.3d 1262 (Div. 1, June 23, 2020).

MARRIAGE

18. *WISNIEWSKI*: FRAUD AS A JUSTIFICATION FOR ANNULMENT MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE

Court annulled marriage based on Husband's allegations of fraud. Husband claimed Wife married him only to receive legal residency in the U.S., which defrauded him. The trial court by a preponderance of the evidence determined that Husband was

defrauded. Wife appealed. Division One reversed and remanded, holding that the correct standard of proof was clear and convincing evidence, citing *State v. Renforth*, 155 Ariz. 385, 387 (App. 1987) ("The clear and convincing standard is reserved for cases where substantial interests at stake require an extra measure of confidence by the fact finders in the correctness of their judgment..."). To void a marriage for fraud, the clear and convincing standard should apply.

Wisniewski v. Dolecka, No. CA-CV 19-0667 FC, 489 P.3d 724 (Ariz. Ct. App. Div. 1 May 4, 2021).

CHILD SUPPORT

19. ***GELIN/MURRAY*: IN A PATERNITY ACTION UNDER A.R.S. § 25-809(A)-(B), THE SUPERIOR COURT MUST AWARD RETROACTIVE CHILD SUPPORT DATING BACK TO THE PETITION FILING DATE; AN AWARD OF SUPPORT PRIOR TO THE PETITION FILING DATE LIES WITHIN THE COURT'S DISCRETION–PAYEE NEED NOT PROVE EQUITABLE DEFENSES; THE COURT IS NOT REQUIRED TO MAKE SPECIFIC FINDINGS UNLESS THE COURT ORDERS SUPPORT DATING BACK MORE THAN THREE YEARS**

In this paternity action, the Court granted retroactive child support under A.R.S § 25-809(A)-(B) to the date the petition was filed. It did not grant Mother's request to order support for the three years prior, finding that Mother deliberately kept Father out of the Child's life. Mother appealed, alleging that an award going back three years was mandatory absent a valid equitable defense by Father. After reciting a somewhat checkered history of decisions, including memorandum decisions and the date the statute was amended (1997), Division One denied Mother's appeal and used the occasion to clarify the extent of the court's discretion on this issue:

1. The analogue to A.R.S. § 25-809(A) for divorcing parents is A.R.S § 25-320[C], and both statutes should be interpreted the same way.

2. The court ***must*** grant retroactive child support to the date of the filing of the Petition.

3. The Court ***may*** in its discretion grant child support going back three years without making findings on equitable defenses.

4. The Court ***must*** make explicit findings if it orders child support retroactive to a date earlier than three years.

5. Case law to the contrary, including ***DES v. Valentine,*** 190 Ariz. 107 (app. 1997) was superseded by the amendment to A.R.S. § 25-8098(A).

6. Even though the Court's findings about Mother's misconduct (that Mother acknowledged paternity, while at the same time listing another person as the father on the child's birth certificate; that she had moved multiple times without informing Father; and that she excluded Father from the child's life) may not necessarily establish an equitable defense, they do support the exercise of the court's discretion.

Gelin v. Murray, No. 1 CA-CV 20-0487 FC, 2021 WL 2546970, ___ Ariz. ___ (Ariz. Ct. App. Div. 1 June 22, 2021).

SPOUSAL MAINTENANCE

20. *GARLAN:* COURT MAY ORDER POST-MORTEM SPOUSAL MAINTENANCE

Husband requested the Court to terminate or modify the Decree ordered medical-insurance spousal maintenance order. After an evidentiary hearing, the court modified the Decree to permit maintenance to expire when Wife was eligible for Medicare coverage at 65. However, the court also ordered the medical insurance payments to be paid from Husband's estate in the event of his death. Husband appealed, contending that (1) the medical insurance requirement was a contractual obligation, not a support order; and, (2) the court had no authority to order post-mortem spousal maintenance. Division One quickly dispatched the first argument regarding medical insurance because Husband's own petition characterized it as a spousal maintenance obligation.

As for post-mortem spousal maintenance, the Court held it was well within the Court's authority under A.R.S. §25-327(B). "*Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated on the death of either party or the remarriage of the party receiving maintenance*. Here the court "expressly provided" that the obligation was to continue post-mortem. This statement satisfies the requirement for "express" language "relating to termination, to the effect that the spousal maintenance obligation will not cease upon the death of the obligor. The plain text of the statute warrants this conclusion."

The statute is in the disjunctive. Maintenance terminates unless it is otherwise (1) "Agreed in writing" **OR** (2) "expressly provided in the decree". The latter expression refers to the powers of the court. A decree of dissolution is a judgment or an *act of a court* which fixes clearly the rights and liabilities of the respective parties (citing ***Zale***). This authority also applies to a modification hearing. Decrees remain subject to the

court's continuing jurisdiction to modify support. Division 1 was also persuaded by the commentary to the Uniform Marriage and Divorce Act §316(b) (which the legislature adopted wholesale when it enacted A.R.S. §24-327(B) in 1973), which endorsed this approach.

Garlan v. Garlan, 249 Ariz. 278, 468 P.3d 1239 (Div. 1, June 18, 2020).

[**PRACTICE TIP:** Post-mortem spousal maintenance can be especially useful in May-December marriages where parties may have been married a long time, but given the age of the payor, any maintenance order could have a short shelf life.]

21. ***GOTTIER:*** **LIFE INSURANCE POLICY PAYABLE TO THE PARTY'S ESTATE IS NOT EXEMPT FROM CREDITORS; EXERCISE CAUTION WHEN SECURING CHILD SUPPORT WITH LIFE INSURANCE TO MAKE SURE THE SPECIFIC BENEFICIARY IS NAMED**

Life insurance proceeds paid to a decedent's estate, as specified in the life insurance contract, are property of the estate, and are **not** exempt from claims by the estate's creditors under A.R.S. §20-1131 (2020). That section provides that the beneficiary of a life insurance policy or another person to whom the policy proceeds are made payable may receive the proceeds without potential liability to the policy owner's creditors or representatives, so long as the recipient is not the owner of the policy or the owner's legal representative; it does not, exempt all life insurance proceeds from creditors' claims.

In re Estate of Gottier**,** 250 Ariz. 104, 475 P.3d 1144 (Div. 1, Filed September 22, 2020).

22. ***LANE:*** **MEMORANDUM DECISION: PAYEE NOT REQUIRED TO USE RETIREMENT PRINCIPAL TO SUPPORT SELF BEFORE REACHING RETIREMENT AGE; HOWEVER, THE COURT MUST CONSIDER INCOME FROM THE ACCOUNT, IF APPROPRIATE, AND NOT REQUIRED FOR FUTURE SAVINGS**

The court need not require Wife to use the principal in her retirement account to support herself before reaching retirement age. See ***Gutierrez***, 193 Ariz. at 348, ¶ 18. The court must, however, consider "all property capable of providing for the reasonable need of the spouse seeking maintenance." ***Deatherage***,140 Ariz. at 320.

Lane v. Lane, No. 1 CA-CV 18-0165 FC (Div. 1, March 12, 2020) (Memorandum Decision).

PROPERTY AND DEBTS

23. *FEMIANO* AND *SABA*: IF POST-MARITAL PROPERTY IS PURCHASED WITH COMMUNITY FUNDS, AND THE COMMUNITY MAKES ALL THE PAYMENTS, BUT ONE SPOUSE SIGNED A DISCLAIMER DEED, IT HAS A LIEN FOR CONTRIBUTIONS TO PRINCIPAL AND EITHER: (1) 100% of THE INCREASE IN VALUE; OR (2) ONLY A FRACTION OF THE INCREASE IN VALUE

If that heading sounded weird, it was. But what is weirder is that Division One has issued both opinions – which clearly conflict. It is now up to the Arizona Supreme Court to decide the winner.

Femiano and ***Saba*** rest on similar facts. In both cases:

- The parties purchased property after marriage with community funds, and thereafter paid all of the mortgage.
- One party (Titled Party) obtained the mortgage in their name alone and took title as separate property because of the other party's credit issues.
- The Non-Titled Party signed a Disclaimer Deed.
- Fraud either was not pled, or was pled untimely.

Yet in ***Femiano*****,** the Division One found that the correct formula to determine a community lien was to give the community credit for 100% of the reduction in principal (because the community made all the payments); and to give the community a lien for 100% of the appreciation. Effectively, it prioritized **home equity** as the basis for the lien.

Unlike ***Drahos*** and related cases, ***Femiano*** involved property acquired during marriage and paid for solely with community funds. Thus, the case was found distinguishable from ***Drahos***, where property was acquired during marriage, and both separate and community funds had been expended during marriage.

In ***Saba*****,** Division One (a different department) applied ***Drahos***, where the formula for a community lien is:

(CRP), which community reduction to principal; plus
(CRP/PP*(TA), which is the community's share of appreciation, expressed as a fraction, – the numerator is the community reduction in principal and the denominator is the purchase price – multiplied by the total appreciation.

The result is a dramatically reduced lien compared to the ***Femiano*** approach. That is because ***Drahos*** does not focus on home equity. Instead, the goal is to reimburse the community for principal contributions and reward those contributions with a proportionate share of appreciation.

The difference is dramatic. For example, in ***Saba***, the community lien was **$68,558** based on the ***Drahos*** formula where CRP ($39,741) = community reduction to principal; PP ($199,900) = the purchase price; and TA ($145,110) = total appreciation.

Applying the ***Femiano*** formula to the same example would net a community lien of **$184,851** ($39,741 + $145,110).

Additionally, the fate of disclaimer deeds hang in the balance.

In ***Femiano*****,** the Court held that the Disclaimer Deed served to disclaim interest in the actual ownership of the property, but it does not affect the calculation of the community lien.

In ***Saba,*** the Court held that a Disclaimer Deed cannot be analyzed as a post-nuptial agreement under ***In re Harber*** because a Disclaimer Deed is signed by just one party; and do not define each spouse's property rights in the event of death or divorce– they simply renounce ownership in property. The Disclaimer Deed effectively justifies the windfall that a ***Drahos*** formula produces in favor of the Titled Party. However, a Disclaimer Deed does not cause the non-owning party to forfeit a community lien.

> ***Femiano v. Maust***, 248 Ariz. 613, 463 P.3d 237 (Div 1, April 23, 2020), review denied (Dec. 15, 2020); ***Saba v. Khoury***,481 P.3d 1167 (Div. 1, January 21, 2021), as amended (Feb. 23, 2021), as amended (Mar. 23, 2021).
>
> [**EDITOR'S NOTE:** Applying ***Drahos*** means that the identical community contributions can translate into a different lien depending solely on the purchase price of the property.]
>
> [**SECOND EDITOR'S NOTE:** Disclaimer deeds for property acquired after marriage in one party's name due to credit or other issues are a common occurrence. Be sure to plead and prove claims of fraud and list the issue in the Pretrial Statement.]
>
> [**THIRD EDITOR'S NOTE:** Always ask for findings of fact and conclusions of law– ***before*** the trial.]

[**FOURTH EDITOR'S NOTE:** The preliminary injunction does not preclude a party from selling separate property prior to trial, even one that has a community lien asserted against it. But the non-owning party should be sure to ask the Court to sequester the proceeds until the issue can be resolved.]

[**Fifth Editor's Note:** Be ever so careful when drafting a Disclaimer Deed. It does not necessarily protect against a community lien. Make sure you include a disclaimer of all future interests.]

[**SIXTH EDITOR'S NOTE:** It is good to remember that in ***Bell-Kilbourn***, the Court went out of its way to point out that no community funds had been used with respect to the property. That left an opening for the Court's decision in ***Femiano*** where only community funds had been used.]

24. *BOWSER:* SEVERANCE PAY EARNED DURING MARRIAGE IS COMMUNITY PROPERTY

Husband received a negotiated severance pay package. It was deemed to be community because Husband's employment began and ended during the marriage and community labor was expended in its acquisition. When community labor is expended in the acquisition of a future severance package, the community is entitled to a share of the severance, even if the severance was negotiated and paid **after** a petition for dissolution is filed.

Bowser v. Nguyen, 249 Ariz. 454, 471 P.3d 665 (Div. 1, July 16, 2020).

25. ***DOLE:*** **TRIAL COURT MUST ACTUALLY DIVIDE PROPERTY UPON DISSOLUTION OF MARRIAGE; IT CANNOT ORDER PARTIES TO OWN PROPERTY TOGETHER; SPECIAL ACTION MAY ALSO BE ACCEPTED WHEN THE TRIAL COURT'S DECISION CANNOT BE JUSTIFIED UNDER ANY RULE OF LAW**

The trial court refused to divide the community's interest in their two homes, but (citing best interests of the parties' six children) ordered the parties to co-own the properties as joint tenants with rights of survivorship for six years. Father was granted exclusive use of the rental property and Mother was granted exclusive use of the marital residence. Father filed a Request to Alter/Amend, which was denied. Father then filed a Special Action.

The Court of Appeals noted that jurisdiction over Special Action review is generally appropriate when there is no equally plain, speedy, and adequate remedy by appeal; however, **special action is also frequently accepted when under no rule of law can justify a trial court's actions.**

A.R.S. §25-318 directs the court to divide the community and jointly held property equitably upon dissolution of their marriage; a substantially equal division is not required if "sound reason exists to divide the property otherwise" ***Toth v. Toth***, 190 Ariz. 218, 221 (Arizona Supreme Court, October 9, 1997). In arriving at an equitable distribution of property, this statute requires the court to consider certain enumerated factors. A.R.S. §25-318.b-c. The court may also consider non-enumerated factors including the source of funds and other equitable factors. ***Toth***. Regardless, the court **must** divide any community property at **dissolution**. *See also* ***Koelsch v. Koelsch***, 148 Ariz. 176, 181 (Arizona Supreme Court, January 28, 1986) (when the community property is divided at dissolution pursuant to §25-318, each spouse receives an immediate, present and vested separate property interest in the property awarded to them by the trial court).

Although a court has broad discretion in allocating property, it has no authority to compel either party to divest themselves of title to separate property. ***Proffit v. Proffit,*** 105 Ariz. 222, 224 (Arizona Supreme Court, December 12, 1969). On remand the trial court was directed to order the parties hold the properties as tenants in common, not with rights of survivorship.

As to Mother's argument that ***In re Marriage of Berger,*** 140 Ariz. 156, 168 (Div. 1, September 27, 1983) allows the court to consider the children's interests when it divides property, the Court of Appeals reasoned that there were extenuating circumstances in that case. It clarified that a court may consider the parties' children in

deciding which party should be awarded a given piece of property; however, in doing so, the court may not impinge on either party's property interests, which must be divided at dissolution. In this case, the trial court improperly deprived both parties of their interests in their separate property for six years after the divorce was finalized.

Dole v. Blair in & for Cty. of Maricopa, 248 Ariz. 629, 463 P.3d 849 (Div. 1, April 14, 2020).

26. *DELUNA*. SPOUSE MAY HAVE REIMBURSEMENT CLAIM FOR SEPARATE DEBT PAID AFTER DATE OF MARRIAGE

Wife claimed that Husband owed the community for reimbursement for his separate child support obligations made from community funds. Although the Court denied the claim based on insufficient evidence, it allowed the legal theory. Although this is a 2019 case, it is included because it raises a novel issue.

DeLuna v. Petitt, 247 Ariz. 420, 450 P.3d 1273 (Div. 1, 9/5/19)

27. *PODGORSKI:* ARIZONA'S REVOCATION-ON-DIVORCE STATUTE DID NOT REVOKE DECEDENT'S DISPOSITIONS IN FAVOR OF EX-SPOUSE'S ADULT CHILDREN

The Decedent's siblings argued that A.R.S. §14-2804 superseded the will's and trust's provisions in the stepchildren's favor, leaving the siblings to inherit by intestate succession. However, the superior court had found that undisputed post-divorce acts evinced decedent's intent to reaffirm his dispositions to the stepchildren and held that §14-2804 did not apply because the relationship between them continued after the divorce, with no interruption because of it.

Matter of Estate of Podgorski, 249 Ariz. 482, 471 P.3d 693 (Div. 1, August 6, 2020).

28. *OSBORNE*: MEMORANDUM DECISION: *AUSTIN* AND *HARBER* DISTINGUISHED FROM OPERATING AGREEMENTS THAT ARE NOT INTENDED TO DEFINE PROPERTY RIGHTS IN THE EVENT OF DEATH OR DIVORCE

LLC operating agreements may qualify as postnuptial agreements under certain circumstances, subjecting them to ***In re Harber's Estate's*** analysis but there are limitations. ***Austin v. Austin,*** 237 Ariz. 201, 206-07, ¶ 14 (Division 2, April 30, 2015). In ***Austin,*** the Court held that the Operating Agreement gave the husband exclusive, absolute power and control over the LLC and its assets, placing "severe and permanent"

limitations upon the wife's property rights, affecting those rights "to the same or greater extent than would a post-nuptial property settlement agreement". *Id*. The operating agreement effectively qualified as a postnuptial agreement, triggering ***Harber's Estate's*** burden of proof. ***Austin***, 237 Ariz. at 208, ¶ 20. However, the operating agreement's purpose and effect in this case were wholly different from those in ***Austin***. While the ***Austin*** spouses used LLC operating agreements to accomplish the same ends as traditional postnuptial agreements; **that is, maneuvering property to plan for death or divorce**, the operating agreement here was created for the purpose of—and indeed was used for—facilitating real estate purchases and transfers unrelated to estate planning. Further, in contrast to the severe restrictions imposed upon the wife's property rights in ***Austin***, the operating agreement here gave Husband and Wife equal power and control over the LLC's management and assets. Because the GPO Enterprise operating agreement's purpose was not to define property rights in the event of death or divorce, the superior court correctly concluded it did not qualify as a postnuptial agreement. Accordingly, the court properly declined to impose the ***Harber's Estate*** burden upon Husband, and properly imposed upon Wife the burden to rebut by clear and convincing evidence the presumption that her transfer of property into the LLC constituted a gift.

Osborne v. Osborne, No. 1 CA-CV 19-0351 FC (Div. 1, March 5, 2020).

29. *SILVA*: MEMORANDUM DECISION: COURT DOES NOT HAVE TO DIVIDE COMMUNITY DEBT EQUALLY; IN ADDITION, COURT CAN TAKE INTO ACCOUNT THE PARTIES' EARNING ABILITY IN DECIDING ALLOCATION OF DEBT.

Although this is just a Memorandum decision, it cites case law to support its rather interesting conclusion.

The court ordered Husband to pay 80% of the debt. Husband appealed. Division One affirmed. This is what they had to say:

(1) The superior court has broad discretion in apportioning community property and debt between parties at dissolution. ***Boncoskey v. Boncoskey***, 216 Ariz. 448, 451, ¶ 13 (Div. 1, September 25, 2007).

(2) We presume that debts incurred during marriage are community obligations unless the party seeking to overcome this presumption provides clear and convincing evidence to the contrary. ***In re Marriage of Flower*****,** 223 Ariz. 531, 537, ¶ 24 (Div. 1, February 25, 2010).

(3) Under A.R.S. §25-318, community property is to be divided "equitably" absent a sound reason otherwise appearing in the record. See ***Toth v. Toth****,* 190 Ariz. 218, 221 (1997); see also A.R.S. §25-318.c (family court may consider excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community property when dividing such property at dissolution). " 'Equitable' is a concept of fairness dependent upon the facts of particular cases." ***Toth,*** 190 Ariz. at 221.¶21.

(4) An equitable distribution of property need not be exactly equal "but must result in substantial equality." ***Miller v. Miller,*** 140 Ariz. 520, 522 (Div. 1, May 15, 1984); *See* ***Flower*****,** 223 Ariz. at537, ¶24("Division of property upon dissolution should.... take into consideration the overall marital estate.");

(5) *See also* ***Neal v. Neal,*** 116 Ariz. 590, 594 (Arizona Supreme Court, October 6, 1977) (approving consideration of "future earning ability" in the apportionment of community obligations).

Silva v. Silva **(Memorandum decision)** 1 CA-CV 19-0684FC (Div. 1, Filed September 8, 2020).

GENERAL JURISDICTION ISSUES

30. *MAJOR/COLEMAN*: CASE MAY BE DISMISSED WITH PREJUDICE, BUT COURT CAN STILL RETAIN JURISDICTION TO ISSUE ORDERS

Trial court erred in concluding that it did not have the authority to enter an order, upon stipulation, dismissing the case with prejudice but retaining jurisdiction to enforce the parties' settlement agreement in the event of a future default in payment. Courts have inherent or incidental powers that are impliedly given even though the powers may not be catalogued in the constitution or statute. Arizona courts also have recognized that a superior court can issue orders as an exercise of its inherent authority to take actions necessary to effectuate the administration of justice in cases pending before it. Furthermore, the Court of Appeals has previously acknowledged that a trial court, in other circumstances, may dismiss an action while retaining enforcement authority.

Major v. Coleman, No. 2 CA-CV 2020-0081, 2021 WL 1782550, ___ Ariz. ____ (Ariz. Ct. App. Division 2 May 5, 2021).

[EDITOR'S NOTE: This case may be useful to obtain the Court's approval on a post-nuptial agreement which will survive the entry of dismissal of a Legal Separation or Dissolution action].

31. ***TANNER:*** **ARIZONA COURT MUST DISMISS PETITION FOR DISSOLUTION WHEN NEITHER PARTY RESIDED HERE FOR 90 DAYS PRIOR TO THE FILING; ONE PARTY CANNOT WAIVE THE REQUIREMENT; ANY PARENTING ORDERS ARE ALSO VOID UNLESS A PARENT MOVES TO CONTINUE THE PROCEEDINGS UNDER A.R.S. §25-404**

Mother and Father met in the military, lived and had contacts in many states, including Arizona, but never permanently lived here. In August 2019, Mother moved the children to Washington without knowledge of Father, who lived in Hawaii. Father petitioned for dissolution in Arizona and asserted he and Mother had been domiciled in Arizona for 90 days. Mother argued the Arizona court did not have subject matter jurisdiction. The Arizona court found that neither party had been domiciled in Arizona, but declined to dismiss the case because Father had waived subject-matter jurisdiction and he "planned to move to Arizona in a matter of weeks." Arizona then entered orders on parenting and child support issues.

In the meantime, Mother filed a parallel petition in Washington. The Arizona and Washington court held a UCCJEA hearing. Washington declined jurisdiction over both the dissolution and parenting issues if Arizona retained jurisdiction. Arizona reiterated it had custody jurisdiction and would have dissolution jurisdiction by March after Father had resided here 90 days. Arizona subsequently permitted Mother to move the venue for the dissolution, but not the parenting orders. Division One granted Mother's appeal. The Arizona court lacked subject-matter jurisdiction to dissolve the marriage because the waiver of one party is not enough to retain jurisdiction in an improper venue. The Arizona court also lacked jurisdiction to adjudicate child issues because the Father did not petition for them separately under §25-404(B). They were void because they stemmed from the dissolution petition. The award of fees in favor of Father was an abuse of discretion.

Tanner v. Marwil in & for Cty. of Maricopa, 250 Ariz. 43, 474 P.3d 1206 (Div. 1, October 20, 2020).

[**EDITOR'S NOTE:** The Court did not address this, but it is fundamental that subject matter jurisdiction is not waivable by one, or two or even all the parties.]

32. ***McDANIEL v. BANES* (MEMORANDUM): A FOREIGN JUDGMENT IS DUE FULL FAITH AND CREDIT ONLY IF IT IS CONSIDERED FINAL UNDER THE LAW OF THE STATE WHERE IT WAS ISSUED; FOUR-YEAR STATUTE OF LIMITATION ON DOMESTICATING AND ENFORCING AN AMENDED FOREIGN JUDGMENT BEGINS TO RUN ON THE DATE THE AMENDED JUDGMENT IS DEEMED FINAL PURSUANT TO THE UEFJA**

The trial court denied a motion to vacate a recorded foreign judgment and refused to quash a writ of garnishment related to that judgment. A.R.S. §12-544(3) imposed a four-year statute of limitations to a foreign judgment originally issued in 2010. However, the Judgment was amended in 2019 and was considered final at that time and enforceable under the foreign state's laws. Accordingly, the four-year Arizona limitations period on domesticating and enforcing that judgment did not begin to run until 2019 - when the amended judgment was entered. In this case, the amended judgment was issued pursuant to a rule permitting correction of clerical errors or omissions.

McDaniel v. Banes, 2020 WL 4218021 (Division 1, July 23, 2020) (Memorandum Decision).

[**PRACTICE TIP:** If the statute of limitations bars domestication and enforcement of a foreign judgment, consider an attempt to amend it. This case suggests that this re-triggers the statute of limitations for domestication and enforcement.]

33. ***NELSON v. NEVADA*: A TRUST MAY BE A PARTY TO A DIVORCE ACTION SUBJECT TO A PRELIMINARY INJUNCTION BASED ON THE PARTIES' COMMUNITY INTEREST THEREIN**

In this writ proceeding, the Supreme Court concluded a preliminary injunction applied to the parties' respective spendthrift trusts because the injunction applies to all property subject to a claim of interest.

Nelson v. Eighth Jud. Dist. Ct. in & for Cty. of Clark, 137 Nev. Adv. Op. 14, 484 P.3d 270 (2021)

APPEALS

34. *YEE*: UNDER A.R.S. §12-2101(A)(2), A POST-DECREE ORDER IS A "SPECIAL ORDER MADE AFTER FINAL JUDGMENT", AND IS APPEALABLE WITHOUT RULE 78.C LANGUAGE, BUT ONLY IF THE COURT RESOLVES ALL RELIEF SOUGHT IN THE MOTION; A RULING ON A RULE 85 MOTION FOR RELIEF THAT DOES NOT CULMINATE IN A RULE 78.B or 78.C FINAL JUDGMENT CANNOT BE CHALLENGED BY A RULE 83 MOTION TO ALTER OR AMEND

This case is just the latest in a long history of iterations on the age-old question of when is a family court order appealable. At least Division One recognized the legal fog and that the court **has not spoken with one voice**. It ended up punting the issue to the Supreme Court by asking for a clarifying rule for family law post-decree cases. In the meantime, this is what we have. The outcome is plain enough. The road getting there was really circuitous.

It all started in 2009 with a Decree of Dissolution. Fast forward to 2016. The Court entered post-decree orders in Father's. Due to Mother's intervening bankruptcy, Father did not file an application for fees until April 2018. Mother never objected and in **May 2018,** the Court ordered that Mother pay Father $59,000 in fees.

Mother waited until **August 2019** to file a Rule 85 (Motion for Relief from Judgment) Motion, which the Court denied in **December 2019**. On **January 14, 2020,** the Court entered judgment and ordered Mother to pay additional fees. In late December 2019, Mother filed a Rule 83 Motion to amend the December 2019 Order, which the Court denied on **1/21/20. On 2/4/20**, the Court issued an MEO clarifying the January 14, 2020 Order. In March 2020, Mother asks for an Order for Rule 78.C language, which the Court granted in **April 2020**. Two days later, Mother filed an appeal from all of the above orders.

Father requested dismissal of the entire appeal because each post-decree ruling was a "**special order made after final judgment**" under A.R.S. §12-2101(A)(2), meaning they were immediately appealable even without Rule 78 language. Mother relied on A.R.S. §12-2101(A)(1), which allows for an appeal from "a final judgment entered in an action . . . commenced in a superior court." In dismissing the appeal, the Court made several key points:

- **Special Orders After Final Judgment.** To constitute a "special order made after final judgment," under A.R.S. §12-2101(A)(2) an order must:

(1) **involve different issues than "those that would arise from an appeal from the underlying judgment"** and (2) **affect the underlying judgment by enforcing it or staying its execution**.

- **Special Orders Do Not Focus on Rule 78.C Language.** An analysis of what constitutes a special order made after final judgment does not focus on Rule 78.c. language. Rather, it focuses on the issues resolved in the order and whether it seeks to enforce or stay the decree. A Court Rule (such as Rule 78) cannot expand appellate jurisdiction beyond a statutory grant and is irrelevant to the Court's interpretation of its statutory authority under A.R.S. §12-2101. (Here, the May 2018 judgment awarding Father more than $59,000 in fees and costs resolved the entirety of the post-decree motion).

- **A Rule 85 Order *May* Qualify as a Special Order.** A Rule 85 Order addressing resolution of a post-decree matter is appealable as a special order without Rule 78.C. language. For examples: *See, e.g.*, ***Cone v. Righetti***, 73 Ariz. 271, 275 (1952) (post-decree order affecting custody and support of minor children); ***Williams v. Williams***, 228 Ariz. 160, 165–66 ¶¶ 19–20 (App. 2011) (post-decree order modifying spousal maintenance); ***Sheehan v. Flower***, 217 Ariz. 39, 40 ¶ 8 (App. 2007) (post-decree order on grandparent visitation); ***Merrill v. Merrill***, 230 Ariz. 369, 371–72 ¶¶ 5–6 (App. 2012) (post-decree order on military retirement benefits). (Here, the December 2019 minute entry denying Mother's Rule 85 motion also was a special order after final judgment. By no later than the entry of the January 14, 2020 judgment awarding Father fees, the family court had resolved the entirety of that motion).

- **Not Every Post-Decree Order is Appealable. Full Resolution is Required.** Not every family court order addressing a post-decree motion or petition is appealable. The family court must have fully resolved all issues raised in a post-decree motion or petition before an appeal can be taken under A.R.S. §12-2101(A)(2). Significantly, the Court noted that the current Rules do not reflect this requirement. To avoid uncertainty and confusion, the court suggests the Arizona Supreme Court consider a rule change directing the family court to state when it has fully resolved a post-decree motion or petition.

- **Rule 83 Motion Can Extend Time for Filing Appeal, But it is Very Limited.** A Rule 83 Motion (alter or amend) can extend the time for filing

an appeal, but Rule 83 is limited to a specific subset of judgments. *See* Rule 78(a)(1) (defining judgment as including "an order from which an appeal lies"). In other words, final Rule 78.C. language is required in the underlying Order from which a Rule 83 Motion is filed. Mother's Rule 83 Motion did not involve an underlying Order with final judgment language (*Note*: cases relying on Civil Rules 59 and 60 are inapplicable because those rules do not require final judgment language).

Choy Lan Yee and Yee, 251 Ariz. 71, 484 P.3d 650, (Div. 1, March 25, 2021).

35. *CHAPMAN*: A CONTEMPT ORDER THAT ENFORCES A PRIOR PROPERTY DISPOSITION ORDER AND WAS CERTIFIED AS A FINAL JUDGMENT IS ONLY APPEALABLE BY SPECIAL ACTION

Finding that it lacked jurisdiction, Division Two dismissed Husband's appeal from the trial court's order entering judgment for Wife as a result of Husband's failure to comply with a court order. It lacked jurisdiction to entertain a direct appeal from the trial court's order of contempt, which enforced a previous property disposition order and was certified as a final judgment pursuant to ARFLP Rule 78.

In re Marriage of Chapman, 251 Ariz. 40, 484 P.3d 154, (Div. 1, March 23, 2021).

[**EDITOR'S NOTE:** Chapman footnote: it is appropriate to rely on cases interpreting civil rules that are identical to a family law rule.]

36. *MORENO:* OOP IS ALWAYS APPEALABLE REGARDLESS OF FINALITY (SUPERSEDES *McCARTHY*)

Moreno filed OOP against roommate (Beltran). After a hearing the OOP was dismissed and the Court directed Beltran to file a ***China Doll*** affidavit. Moreno filed a notice of appeal, after which Beltran submitted her application for fees, which the court granted. Moreno did not file another notice of appeal or amend or supplement his original one. Moreno argued the trial court erred by ruling on attorney fees while an appeal was pending. However, Division One found an OOP is always appealable regardless of finality, thereby overruling ***McCarthy v. McCarthy,*** 247 Ariz. 414 (Div. 2, August 20, 2019). ARPOP 42, as amended on 1/1/20, states that OOPs are not subject to the civil rules. Further, "a ruling on fees would neither negate the substance of the order of protection nor frustrate the appeals process resulting from the order".

Moreno v. Beltran, 250 Ariz. 379, 480 P.3d 647 (Div.1, December 15, 2020), review denied (Apr. 13, 2021).

37. ***CARPENTER* (MEMORANDUM): RULE 83 MOTION TREATED BY THE COURT AS SUCH MAY EXTEND THE TIME FOR APPEAL EVEN IF IS REALLY A RULE 35.1 MOTION FOR RECONSIDERATION**

Father argued that Mother's Rule 83 Motion (Alter or Amend, which extends the time for appeal) was really a Rule 35.1 Motion (Reconsideration, which does not extend the time for appeal) in disguise. However, because the trial court treated and ruled on the Motion pursuant to Rule 83, the appeal was timely.

Generally, civil-contempt orders are reviewable only by special action. The exception, however, is when a contempt order goes beyond the finding of contempt and instead is based upon an underlying order, which is appealable pursuant to §12-2101. Here, Father's request for contempt was based on Mother's alleged interference with reunification therapy and failure to comply with provisions regarding the marital home. The relevant order required Mother, among other things, to refinance the marital residence and make the mortgage payments. It is, therefore, appealable under §12-2101(A)(2) because it was an order modifying an underlying dissolution decree, which is an appealable special order after judgment.

Rule 92 provides a separate ground for attorneys fees in contempt actions (in addition to A.R.S. §25-324) Under Rule 92, a court may in its finding of contempt order "appropriate sanctions for obtaining the contemnor's compliance with the order including attorneys fees, provided the order includes a purge provision.

Carpenter and Carpenter, No. 2 CA-CV 2020-0058-FC, April 5, 2021 (Memorandum Decision).

38. ***IN RE PIMA COUNTY MENTAL HEALTH*. IN A CIVIL CASE, NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS CAN EXTEND THE TIME FOR APPEAL EVEN ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL WHO FAILED TO FILE A TIMELY NOTICE, UNLESS A PARTY DID NOT RECEIVE NOTICE OF ENTRY OF THE JUDGMENT**

In a civil case when a notice of appeal is not timely filed, the Court of Appeals does not have jurisdiction to decide the appeal. In addition, a trial court does not have authority to extend the time for appeal **unless a party did not receive notice of the entry of judgment**. This is true even where the delayed appeal is allegedly caused by

ineffective assistance of counsel when the attorney failed to timely file his notice of appeal.

> ***In Re Pima County Mental Health Case***, No. A20170058, 248 Ariz. 118, 458 P.3d 122 (Div. 2, January 23, 2020).

PROCEDURE/EVIDENCE

SUPREME COURT DITCHES CITATION BAGGAGE

A strategy disposing of "citation baggage" was just embraced at the Supreme Court. Baggage accrues when court decisions and briefs quote an earlier source, which quotes an even earlier source, etc. An FTC appellate lawyer proposed instead a single phrase - "cleaned up" in parentheses - to signal that extraneous material was removed. In a February decision, Justice Clarence Thomas adopted the method without comment. This has swept the country and appeared in 5,000 judicial opinions. Thanks to Tim Eigo for this tidbit.

39. *SOLORZANO:* WHERE CREDIBILITY IS IN ISSUE, DUE PROCESS USUALLY REQUIRES THE TRIAL COURT ACTUALLY HEAR TESTIMONY BEFORE MAKING A DETERMINATION OF THE CREDIBILITY OF A PARTY

By stipulation, the parties submitted the issue of modification of child support orders based solely on written submissions. Based solely on the memoranda, the trial court found that Father was not credible, modified his child support obligations and awarded fees to mother. Father appealed. Division One reversed, holding that Father did not waive his right to due process by stipulating to written submissions. Accordingly, the trial court denied Father due process by assessing his credibility without hearing any in-person testimony, especially given the potential effects on the best interests of the children. Although there may be limited situations where declarations allow credibility determinations (for example, when a declaration is demonstrably contrary to a document),

the affidavits presented here did not allow for such a determination absent testimony, which may serve as an adversarial check on information on which the court rules. Without that testimony, Father was prejudiced.

Solorzano v. Jensen, 250 Ariz. 348, 479 P.3d 855, (Div. 1, December 29, 2020).

40. ***CLEMENTS:*** **ONE WHO ASSERTS ATTORNEY-CLIENT PRIVILEGE HAS THE BURDEN OF PROOF OF MAKING A *PRIMA FACIE* CASE FOR A SPECIFIC COMMUNICATION: REFRESHER ON FOUR ELEMENTS OF THE PRIVILEGE**

This case involved the appointment of a Special Master to conduct an *in camera* review of recordings of jail phone calls. The State requested the review in connection with its investigation of an incarcerated person. Although this is a criminal case, there are some significant issues relating to attorney-client privilege that also apply in the civil context.

a. **Attorney-Client Privilege Requirements.** A party asserting the attorney-client privilege has the burden of making a *prima facie* showing that the privilege applies to a specific communication. The court may not invade the privilege to determine the existence of the privilege, even *in camera* using a Special Master.

b. **Hearing Required.** Upon such a showing, the court may hold hearing to determine whether the privilege applies. To do this, there are four elements. Each element of the inquiry is fact-specific:

i. **First, the proponent must show that there is an attorney-client relationship.** The existence of a relationship is evaluated by a subjective test which examines the nature of the work performed and the circumstances under which the confidences were divulged. The court must decide whether the party consulting the attorney believes that they are approaching the attorney in a professional capacity and with the intent of securing legal advice. That is, the inquiry should examine a **client's perception o**f the relationship and **intent** to secure legal advice. Formal representation or status as counsel of record is not required.

ii. **Second, the privilege is limited to communications seeking or providing legal advice.** Not all communications made to or received from an attorney are protected. The proponent must explain

how the circumstances indicate the communication was made to secure or provide legal advice. For example, the privilege does not apply when an attorney is consulted as a friend or business advisor. ***Fodor,*** 179 Ariz. at 448); ***G&S Investments v. Belman***, 145 Ariz. 258,264 (Division 2, November 30, 1984). An attorney's avowal is generally entitled to substantial weight.

iii. **Third, the communication has to be made in confidence.** As to this and number four below: one who knows that his conversation may be overheard and makes no effort to safeguard against interception may waive the claim of confidentiality. The court must ask whether the client reasonably understood the communication to be confidential. Permitting the communication to be overheard by individuals who are not a part of the confidential relationship usually destroys the confidentiality requirement.

iv. **Fourth, the communication was treated as confidential.** This remains true even in the unusual circumstances, presented in this case, that the party claiming the privilege does not have possession of the recording of the communication (it was a jailhouse recording).

c. **As for recorded conversations, the court refused to adopt a bright line approach.** Instead, when assessing the confidentiality of communications made on a recorded line, a trial court hold consider the content of any recording warning, the reasonableness of any expectation of confidentiality, and (in a criminal matter) whether the jail's recoding policy presents an unreasonable or arbitrary restriction on a defendant's ability to communicate with counsel.

Clements v. Bernini in & for Cty. of Pima, 249 Ariz. 434, 471 P.3d 645 (Sup. Ct. September 9, 2020).

41. ***IN RE MH:*** **BEHAVIORAL HEALTH PROFESSIONAL PRECLUDED FROM DISCLOSING, THROUGH TESTIMONY OR OTHERWISE, THEIR OBSERVATIONS OF A CLIENT'S BEHAVIOR BASED ON INFORMATION THEY RECEIVED IN THEIR PROFESSIONAL RELATIONSHIP WITH THE CLIENT**

In an involuntary treatment hearing, the trial court allowed a clinical liaison to testify regarding information the Appellant relayed to her as part of their confidential relationship, including information relative to her mental condition that the liaison

obtained from observing appellant's behavior. Appellant argued this was error because the liaison testified about confidential information in violation of the behavioral health professional–client privilege under A.R.S. §32-3283. This precluded the liaison from testifying as an acquaintance witness. The statute does not permit behavioral health professionals to disclose, through testimony or otherwise, their observations of a client's behavior based on information they received in their professional relationship with the client.

In Re: MH 2019-004895, Div. One, August 4, 2020.

42. **THE LEVEL OF INTERACTIONS BETWEEN A SOCIAL WORKER AND A CLIENT MUST BE SCRUTINIZED TO DETERMINE IF IT TRIGGERS A CONFIDENTIAL RELATIONSHIP UNDER A.R.S. § 32-3283; A ONE-TIME INTERACTION FOR ASSESSMENT FOR RISK OF HARM ONLY TOGETHER WITH FAIR WARNING ABOUT THE LACK OF CONFIDENTIALITY DOES NOT QUALIFY**

Interactions between social workers and a client may arise to a level that results in the creation of confidential behavioral health professional-client relationships under A.R.S. § 32-3283. However, this relationship is not created where the social worker interacts with a patient only once to assess whether the patient should be evaluated as a risk of harm to themselves or others; and where the social worker has warned the patient at the outset that any statements the patient makes about harming self or others will not remain confidential.

In re MH2020-004882, No. 1 CA-MH 20-0090, 2021 WL 2931298, at *4 (Ariz. Ct. App. July 13, 2021), as amended (July 20, 2021).

43. **PROPOSED AMENDMENT TO EXPERT WITNESS RULE (FEDERAL RULE 702): PREPONDERANCE OF THE EVIDENCE STANDARD IS THE TEST BEFORE ADMITTING EXPERT TESTIMONY; EXPERT OPINIONS STRAYING BEYOND THE EXPERT'S OWN METHODOLOGY INTO SPECULATION TO BE STRUCK.**

Proposed amendment to Federal Rule 702: The proposed amendments instruct courts to use a "preponderance of the evidence" test before admitting expert testimony, meaning the judge must determine the expert relies upon sufficient facts and has reliably applied scientific methods to arrive at a conclusion. Judges will also be required to strike expert opinions that stray beyond the expert's own methodology into speculation, such as stating they are "100% certain" when that is scientifically implausible.

44. *STEUBE:* CRIMINAL MATTER: AN AUTOMATIC, COMPUTER-GENERATED EMAIL THAT ATTACHES A VIDEO FILE (SURVEILLANCE SYSTEM EMAIL) IS NOT HEARSAY

In a criminal case (in which the same Rules of Evidence apply), a property manager testified that he received an automated, computer-generated, email from a security company after a motion-sensor security camera was activated. A video file was attached to the email and the email specified the date and time the video was recorded. The property manager relied solely upon the email in identifying the date and time of the video. Over Defendant's hearsay objection, the superior court admitted it. Hearsay is generally inadmissible unless an exception applies Ariz. R. Evid. 801, 802. Because the rule against hearsay applies to a person's statements and the person who made the statement, the issue turned on whether a machine that generates information qualifies as a person under the Rules. Because the email and video were "machine produced", they were not made by a "person" and are not hearsay. However, there are other evidentiary concerns, but they should be "addressed through the process of authentication, not by hearsay."

State v. Stuebe, 249 Ariz. 127, 467 P.3d 252 (Div. 1, June 30, 2020).

45. *MARTINEZ:* EVIDENCE AND TESTIMONY IN OOP HEARING SHOULD BE LIMITED TO ONLY WHAT IS RELEVANT TO THE ALLEGATIONS IN THE PETITION

At an OOP hearing in May of 2018, the court precluded two of Mother's exhibits: a 2018 psych evaluation of Father in which he claimed to have no criminal history and a 1999 summons showing a felony charge against Father. Father argued that the exhibits were irrelevant. Mother argued that this was relevant because it impeached Father's honesty and credibility. Division Two held that Mother did not show that the trial court's preclusion was "manifestly unreasonable or based on untenable grounds." "Limiting the evidence and testimony to that relevant to allegations in the petition is precisely what the court was required to do".

Martinez v. Pacho, 2020 WL 4342235 (Division 2, July 28, 2020).

46. *STICKLER:* MEMORANDUM: COURT NOT BOUND TO ACCEPT UNCONTRADICTED TESTIMONY NOT CORROBORATED BY ANY OTHER EVIDENCE

Although Husband's testimony was uncontradicted, it was not corroborated by any other evidence. Therefore, the court was not bound to accept it. Compare ***Aries v. Palmer Johnson, Inc***., 153 Ariz. 250, 261 (Division 2, March 24, 1987) (Courts are "not bound to accept as true the uncontradicted testimony of an interested party."), with ***Fort Mohave Farms, Inc. v. Dunlap,*** 96 Ariz. 193, 198 (Arizona Supreme Court, June 15, 1964), ("[W]here testimony of an interested witness is corroborated by a disinterested witness, rejection of that evidence amounts to arbitrary action.")

> ***Stickler v. Stickler***, No. 1 CA-CV 19-0115 FC (Division 1, January 1, 2020) (Memorandum).

47. FOIA REQUESTS: THEY ARE EASIER THAN YOU THINK IF YOU USE A ROBOT

DoNotPay is the robot lawyer company known for helping you fight parking tickets, wrangle airline refunds, cancel gym memberships and file for unemployment. Now they have rolled out a tool to request information from government agencies under the Freedom of Information Act. Anyone can use FOIA to request public information, but where is that sweet spot between too broad or too specific? This feature guides you through how to file a request for information, as well as wrangle the fee waivers and option to expedite processing — which is up to you to convince the government department why you should get the information for free and faster than regular FOIA requests. (In reality, the FOIA system is massively under-resourced, and responses can take months or years to get back.) After asking you a series of questions and what you want to request, DoNotPay generates a formal FOIA request letter using your answers and files it to the government agency on your behalf.

REMEDIES

48. *EANS-SNODERLY:* CONTEMPT AVAILABLE FOR ANY BREACH OF A SEPARATION AGREEMENT, NOT JUST SUPPORT OBLIGATIONS; COURT NOT PERMITTED TO INCARCERATE FOR BREACH OF NON-SUPPORT OBLIGATIONS; §12-1551 (RENEWAL JUDGMENT STATUTE) ATTACHES AT THE TIME A JUDGMENT BECOMES SUABLE; LACHES CANNOT BE RULED UPON AS A MOTION FOR SUMMARY JUDGMENT WHERE THERE ARE MATERIAL DISPUTED FACTS

That's a mouthful, but it is all rooted in some key facts. The parties incorporated an Agreement into a 2006 Consent Decree. It provided that Husband was to pay Wife a $300,000 equalization payment, maintain the business as an ongoing concern, and keep life insurance in place until the debt was paid. Husband was to pay Wife his share of the proceeds from the sale of the residence and then make monthly payments on the balance. However, the amount and duration of the installment payments were left blank along with the date when interest would start. If Husband failed to pay the debt, the decree stated Wife could file a contempt action.

The sequence of events is critical to an understanding of this decision:

- In January 2007, the parties signed a handwritten agreement addressing additional payment terms, including $5,000 a month beginning 30 days after the sale of the residence.

- From 2007 to 2012 Husband made payments to Wife.

- In May 2015, Husband filed for personal bankruptcy; however, the equalization debt was not discharged;

- In October 2015, Wife filed the 2007 Agreement with the Court as a Rule 69 Agreement;

- In December 2016, Wife filed a post-decree petition for contempt for the failure to pay the equalization payment, transferring the business to a third party, and failing to provide the life insurance.

The trial court granted Husband's motion for summary judgment reasoning that A.R.S. §12-1551's judgment renewal limitations barred Wife's claims because his last installment payment was due on April 30, 2011 and Wife filed the Petition after the five

year period for renewing or enforcing judgments. The Court also granted Husband's laches defense. Division One vacated and remanded reasoning as follows.

- **Denial of Contempt Must be Appealed by Special Action, Unless....** A trial court's denial of contempt must be filed as a special action, however, in the court's discretion this direct appeal was treated as a special action;

- **Contempt Is Available, but Not Incarceration:** In 1973, A.R.S. §25-317(E) was amended to read: Terms of the agreement set forth or incorporated in the decree *are enforceable by all remedies available for enforcement of a judgment, including contempt*. (Emphasis added). The only limitation on this remedy for non-support orders is that the court may not order incarceration because it violates Article 2, Section 18 of the Arizona Constitution, which prohibits imprisonment for failure to pay a debt.

- **Judgment Renewal Statute Does Not Start to Run Until There Is a Suable Judgment.**

- **A Time for Payment Must be Established for a Judgment to Be Suable.** A judgment has to be **suable** before the statute of limitations is triggered. Even though the Decree specified the amount of the payment, it did not specify with certainty how or when that debt as to be paid. Until the terms of payment were fleshed out in the Rule 69 Agreement, the entire payment was not immediately due upon entry of the decree and Wife had no right to execute on the judgment. The statute of limitations does not begin to run until such a right exists. ***Groves. v. Sorce***, 161 Ariz. 619, 621 (Division 2, May 18, 1989).

- **Judgment Renewal Statute Only Applies to Money Due at a Specific Time; Not Real Estate Distributions.** The judgment renewal statute applies to payments of a specific amount of money due at a certain time. It does not apply to a decree mandating an equitable real property distribution because such distributions "are not judgments for payments of sums certain or judgments enforcing property liens." ***Jensen,*** 241 Ariz. at 229. The Court rejected Husband's argument that §12-1551 applies to each installment payment as it came due, reasoning that the Decree did not specify the amount or timing of payments.

- **5/10 year Renewal Requirements.** At the time of Wife's Petition, A.R.S. §12-1551 provided that judgments must be renewed or an action brought on it within five years of the entry of the judgment or its renewal (it is now ten years);

- **Rule 69 Agreement is not a Judgment.** The Rule 69 Agreement did not trigger the statute of limitations even though it specified the payment due date. However, this argument is based on the assumption that a Rule 69 Agreement is a judgment subject to renewal under §12-1551. It is not. A judgment is decree and an order from which an appeal lies. The parties never submitted the Rule 69 Agreement to the Court to have it incorporated into an amended decree. Therefore, even if it established payment terms, it is not a judgment.

- **Wife's Requests for Contempt Relating to Husband's Obligations to Maintain the Business and Life Insurance Are Not Equitable Directives, Not Money Judgments and Failure to Comply Does Not Trigger the Statute of Limitations.**

- **Summary Judgment On Laches Was Improper When There Are Material Disputed Facts.** To prevail on a laches defense, a party must show that the other party unreasonably delayed asserting their claims and that the party was prejudiced by the delay. Unreasonable delay may be an issue of fact that precludes summary judgment. Mere allegations of prejudice are insufficient.

Eans-Snoderly v. Snoderly, 249 Ariz. 552, 473 P.3d 337 (Div. 1, August 18, 2020).

[**EDITOR'S NOTE:** It is ironic that Wife was most harmed by the failure to specify the specific terms of payment, but this is what saved her in the end. Also, note that the six-year statute of limitations on written contracts for payment of debt (§12-548(a)) and one-year limitation on contempt proceedings (§12-865(a)) could have been raised, but Husband waived them. (Note that the renewal statute was amended in 2019 to extend the term to ten years from five years).]

[**SECOND EDITOR'S NOTE: Accord: *Braun v. Braun,*** 306 Neb. 890, ___ N.W.2d, August 21, 2020 (Husband failed to pay the joint mortgage debt on the marital home he was awarded and to otherwise hold Wife harmless; the court imposed a jail sentence and purge plan by refinancing the mortgage in his own

name by a certain date or selling the property; order was not a modification of the Decree.]

49. **A.R.S. §§ 12-1551, 12-1611, 12-1612, 12-1613 and 33-964: TIME FOR RENEWAL OF JUDGMENTS EXTENDED FROM FIVE YEARS TO 10.**

50. ***SHOLEM*: FAILURE TO SERVE IN A TIMELY MANNER *MUST* BE EXCUSED IF GOOD CAUSE IS SHOWN; AND *MAY BE* EXCUSED IN THE COURT'S DISCRETION, EVEN IF GOOD CAUSE IS NOT SHOWN; GOOD CAUSE FOR BLOWING A DEADLINE IS DEFINED**

The history is lovingly and thoroughly recited in the decision; and, if you need to know more, you should definitely read this. But the headline must suffice for now.

Sholem v. Gass in & for Cty. of Maricopa, 248 Ariz. 281, 460 P.3d 273 (Sup. Ct, March 30, 2020).

[**EDITOR'S TIP:** ARFLP Rule 40(I) has language similar to ARCP Rule 4.i. This definition of good cause may be applicable to other situations.]

RETIREMENT

51. ***SEBESTYEN*: EVEN WHEN ELIGIBILITY FOR A PENSION IS BASED ON A DISABILITY, WHEN THE PENSION PLAN CALCULATES THAT BENEFIT BASED SOLELY ON ACCRUED YEARS OF SERVICE, THE BENEFIT IS EARNED ENTIRELY THROUGH "ONEROUS TITLE" AS A FORM OF DEFERRED COMPENSATION, MAKING THE PORTION OF THE BENEFIT EARNED DURING MARRIAGE COMMUNITY PROPERTY SUBJECT TO DISTRIBUTION ON DISSOLUTION OF MARRIAGE**

A pension plan based its payment structure solely on Husband's accrued years of service, and not on his disability or its extent. This meant that Husband acquired the benefit by "onerous title", i.e., his previous "labor and industry", as opposed to "lucrative title", e.g. as compensation for his well-being. Onerous title translates into community property. Lucrative title translates into separate property.

The pension was, therefore, community to the extent it was earned during marriage. Husband argued that his disability gave him a choice to retire early; and that he could not have retired early but for his disability. Therefore, the payment was due to his

disability. However, that choice did not change the **character o**f the payment from deferred compensation to disability compensation because of the way the Plan calculated the benefit. Even if Husband ceased being disabled, he would still be eligible to receive the pension at a future date. In setting up the pension the way it did, Husband's employer intended to reward Husband's past labor, not to provide him with prospective compensation. Other points of interest are:

- This is distinguishable from military and federal plans that use statutorily mixed formulas in calculating disability and retirement pay; or allows a retiree to elect between different forms of calculation based on the years of service or disability rating; here Husband's benefit was fixed once he became eligible for retirement regardless of his disability. His disability merely triggered his entitlement.

- This is also distinguishable from disability insurance benefits at issue in ***Hatcher and Hatcher***, 188 Ariz. 154 (App. 1996). There the employee voluntarily paid into the plan; and the plan expressly compensated the employee for disability.

Sebestyen v. Sebestyen, 250 Ariz. 537, 482 P.3d 416 (Div. One, March 9, 2021).

52. ***STOCK:*** **COMMUNITY HAS RIGHT TO REIMBURSEMENT PLUS INTEREST FOR PURCHASING OF A CREDIT FOR A SPOUSE'S PREMARITAL FEDERAL SERVICE; HOWEVER, THE CREDIT ITSELF DOES NOT BECOME A COMMUNITY ASSET; COURT MAY ORDER THAT A PARTY'S FEDERAL RETIREMENT BENEFIT BE PAYABLE TO THAT PARTY'S ESTATE**

During the marriage, the community purchased a credit for Husband's pre-marriage federal service, thereby increasing his ultimate benefit ("Benefit Credit"). After the divorce was filed, the parties entered into a settlement agreement, which provided that Wife was awarded *"her community portion of Husband's federal retirement benefits."* The trial court incorporated the settlement agreement into the Decree. The Decree was not appealed. Wife subsequently moved for entry of retirement benefit division orders that treated the Benefit Credit as community and required that her share of the retirement benefits be paid directly to her or her estate if she predeceased Husband. Husband lodged a competing order, which excluded any portion of the Benefit Credit from being awarded to Wife and required that payment be made to Wife, but not her estate. The trial court adopted Wife's order. Husband unsuccessfully moved to alter or amend the Decree. Division One reversed holding as follows:

- **The court reviews an order denying a motion to alter or amend for an abuse of discretion. The court, review *de novo*, however, the court's characterization of community property.** Although Husband did not appeal the Decree itself, Husband did not waive his right to challenge post-decree orders. The court entered the post-decree orders noting they were consistent with, and done to effectuate, the agreements reflected in the Decree and Husband timely appealed those orders.

- **The community is entitled to reimbursement plus interest from the date of purchase for the community funds.** However, *as a matter of law,* the community did not acquire an ownership interest in retirement benefits attributable to Husband's pre-marriage service. Property acquires its character as community or separate depending on the marriage status of its owner at the time of acquisition. Time of acquisition refers to the time at which the right to obtain title occurs, not to the time when legal title actually is conveyed. Citing bedrock Arizona principles, the Court held that when community funds are spent on identifiable separate property, "the community does not thereby acquire an interest in the title of the separate property itself, but merely has a claim for reimbursement." The fruits of labor expended during marriage are community property. The fruits of labor expended before marriage are separate property. Accordingly, a pension right acquired for labor expended before marriage is separate property, even if funds are used during the marriage to cause that pre-marriage property right to vest.

- **The payable to the estate provision was appropriate and did not modify the Decree in violation of A.R.S. §25-327(A)** when it ordered payment to the Wife's estate. Husband argued that the Court was precluded from entering this order because the parties did not include this provision in their agreement. However, the Court noted that the parties included the retirement benefits in their agreement, which resulted in corresponding provisions in the decree. Upon dissolution, Wife's community share became her "immediate, present, and vested separate property interest" to be disposed of as she wished (citing ***Koelsch v. Koelsch***, 148 Ariz. 176, 181 (Arizona Supreme Court, January 28, 1986). Accordingly, the Court *did not abuse its discretion* by including this provision.

  [**EDITOR'S NOTE:** In addition to the reimbursement credit, the Court reaffirmed the ***Van Loan*** formula for dividing a defined-benefit plan. On remand, it ordered the trial court to apply a fraction with Husband's number

of months of service during the marriage as the numerator and the denominator the total months of service.]

[SECOND EDITOR'S NOTE: The court appears to apply a different standard for calculating a community lien interest in a retirement plan than it does for real property. Under ***Barnett***, a community lien interest against separate real property does not just give the community the reimbursement principal amount plus interest; it also awards the community the benefit of any increase resulting from its investment.]

[THIRD EDITOR'S NOTE: After the Post-Decree Order was entered, Husband filed a supplemental response and notice of Social Security offset pursuant to ***Kelly v. Kelly***, 198 Ariz. 307 (2000). The Motion was untimely and the argument was waived. However, it is a reminder that ***Kelly*** offsets are still alive and kicking.]

Stock v. Stock, 250 Ariz. 352, 479 P.3d 859 (Filed December 29, 2020).

53. ***DELINTT:*** **IF A DECREE SPECIFICALLY DEFERS RESOLUTION OF DISPUTES REGARDING THE DIVISION OF A RETIREMENT PLAN, THEN THE *KOELSCH* ISSUE IS NOT WAIVED BY FAILING TO ADDRESS IT AT THE TIME THE DECREE IS ENTERED**

On the heels of ***Quijada and Quijada***, 246 Ariz. 217, 437 P.3d 876 (Div. 1, February 19, 2019) (where parties agreed in the Decree that Wife would receive her share of the benefits when they were distributed to the employee spouse, her right to subsequently request a ***Koelsch*** payment was waived), the ***DeLintt*** court clarifies **that the issue may generally be deferred in the Decree to a later date without causing a waiver**. There is no need to specifically reserve it as long as there is general language that **future disputes regarding the division of the plans is reserved**:

- ***Koelsch*** **Claim Cannot Be Resolved until the Employee Spouse is eligible to retire.** The Court distinguished this case from ***Boncosky,*** 216 Ariz. At 449-50, 453 (Holding that divorce decree improperly attempted to determine ***Koelsch*** payments fourteen years before the employee spouse was eligible to retire), because Wife here waited until Husband was eligible to retire.

- ***Barron*** **(246 Ariz. 449 (2019)) does not apply because a FERS benefit is not the same as military retirement insofar as the benefits are not contingent on the government accepting the spouse's application for**

retirement. The FERS statute provides that a person "is entitled to an annuity immediately upon separation once he/she has the required number of years of service [after becoming 50 years of age and completing 20 years of service]". 5 U.S.C. 8412(d)(2). Additionally, federal law provides precise and limited authority to state courts to treat only disposable retired pay as community property. There is no such authority precluding Arizona courts from treating FERS benefits as community property. To the contrary, the FERS statutes allow division of "any payments which would otherwise be made to an employee...to the extent provided for in the terms of...any court decree of divorce..." 5 U.S.C. 8467 (a-(a)(1).

- **Tax consequences should be considered.** The Court agreed that this could be considered on remand citing ***Johnson v. Johnson*** (tax consequences could be considered if they can be immediately and specifically determined). Interestingly, the Court of Appeals failed to address the effect of A.R.S. §25-318.B, ("In dividing property, the court may consider all debts and obligations that are related to the property, including accrued or accruing taxes that would become due on the receipt, sale or other disposition of the property....") even though this statute was passed after the ***Johnson*** case was decided.

- **Husband not precluded from exercising its discretion to defer payments subject to repayment with interest and proper security.** (Citing ***Koelsch***, 148 Ariz. At 185).

  DeLintt v. DeLintt, 248 Ariz. 451, 461 P.3d 471 (Div. 1, March 5, 2020).

  [**EDITOR'S NOTE:** Husband failed to raise the issue of whether it would be inequitable to order an employee spouse to indemnify the non-employee spouse **before** the employee spouse actually retires because **married couples cannot receive retirement benefits before the employee spouse retires**. *See* ***Nold v. Nold,*** 232 Ariz. 270, 273 (Div. 1, May 30, 2013). Discerning readers should think about raising this issue.]

54. *DOBBINS:* MAINE: COAP CANNOT CONFER JURISDICTION ON COURT TO ORDER EMPLOYEE SPOUSE TO RETIRE AT A PARTICULAR AGE JUST SO THAT NON-EMPLOYEE SPOUSE CAN RECEIVE THEIR SHARE OF FEDERAL RETIREMENT BENEFITS

MAINE: This case involves a Court Order Acceptable for Processing (COAP) with respect to federal retirement benefits. The Divorce Decree was silent on the issue of whether Wife could collect on her share of Husband's federal retirement benefit when Husband reached retirement age. However, the COAP contained a provision that required Husband to retire at age 62. The Supreme Judicial Court vacated the judgment, holding that the court lacked the authority to order Husband to retire at a certain age.

Dobbins v. Dobbins*,* 2020 ME 73 (Maine Supreme Judicial Court, May 21, 2020).

55. *ALARIE:* MEMORANDUM DECISION: PREFERRED MODE OF DIVISION OF COMMUNITY INTEREST IN RETIREMENT BENEFITS IS THE LUMP SUM METHOD

This case is a reminder that the preferable mode of division of a community interest in retirement benefits is to award the pension rights to the employee and property of equal value to the spouse.

In re Marriage of Alarie & Ha*,* 2 CA-CV 2019-0074 (Division 2, February 26, 2020). (Memorandum)

ATTORNEYS/ETHICS

56. ABSOLUTE PRIVILEGE FOR COMMUNICATIONS WITH THE BAR RELATING TO LAWYER MISCONDUCT DOES NOT PROVIDE ABSOLUTE IMMUNITY FOR AN ABUSE OF PROCESS CLAIM; COMMUNICATIONS THAT OCCUR PRELIMINARY TO A JUDICIAL PROCEEDING, INCLUDING A BAR CHARGE, ARE PRIVILEGED IF A PERSON WAS SERIOUSLY CONSIDERING COMMENCING LITIGATION AT THE TIME OR HAD A GOOD-FAITH BASIS TO BELIEVE SOMEONE ELSE WAS DOING THAT

The heading above is a mouthful. The 30-page opinion is a mind bender and traverses the entire terrain of privileges, immunities, abuse of process claims, and the anti-abrogation clause of the Arizona Constitution. However, for those of you fed up with an attorney's litigation tactics, it is well worth the read.

Goldman v. Sahl, 248 Ariz. 512, 462 P.3d 1017 (Div. 1, March 5, 2020), review denied (Aug. 25, 2020).

57. NEW BEST PRACTICES GUIDES

The Ethics Advisory Group (EAG) has issued new Best Practices guides. Check out the FAQs regarding ER 1.1 (competence), ER 1.2 (scope/allocation), and ER 1.4 (communication). And watch for EAG's growing collection of other recommended Best Practices, coming soon.

58. ARIZONA PERMITS LAYPERSON LAW OWNERSHIP

Arizona's officially become the first state to allow non-lawyers to co-own law firms. Unlike Utah, **this is NOT a pilot program.** The state Supreme Court formally eliminated ethics rule 5.4, which bars such ownership. The stated purpose of the rule change is to make legal services more affordable to a public. Others would debate that. It also allows the licensure of new alternative business structures and legal paraprofessionals - laypeople who could provide limited legal services. Some commentators warn of an unintended consequence - Big Four accounting firms competing with law firms that are not as big or as tech-savvy. Similar changes may be coming in Utah and California.

[**EDITOR'S NOTE:** A note on ABS in Utah: Launching recently in Salt Lake City, Law on Call will offer some legal services with what Glover touted as quick

access to lawyers at a cheaper price than traditional law firms. Structured like a call center, clients will pay a $9-a-month subscription to get "unlimited phone access to licensed lawyers" for legal advice, and can pay for legal work, if needed, starting at $100 per hour, the company said in announcing the new firm this week– Courtesy of Tim Eigo.]

59. **DUTIES OF WITHDRAWING LAWYER. EO 20-0001:**

A withdrawing attorney or attorney attempting to withdraw still must uphold ethical obligations to their ex-client which includes the duty of confidentiality if they appeal the withdrawal to a higher tribunal and must continue to competently represent the client until their withdrawal is granted, they must continue to advise the client of upcoming dates and deadlines relating to the proceeding and may still charge a reasonable fee during representation and the client may always access their client file.

60. **FINANCIAL DISINCENTIVES FOR DEPARTING LAWYERS NOT PERMITTED. EO 19-0006:**

A law firm which asks a departing attorney to pay back $3,500 for each client that was attracted to the firm due to advertising, impermissible under ER 5.6 and distinguishable from the *Fearnow* decision.

61. **RETENTION OF CLIENT INFORMATION. EO-19-0009:**

Lawyers must retain sufficient information regarding the work they have done to permit the client to understand what was done, or to pass on to a subsequent lawyer.

62. **UNDER CONSIDERATION. ATTORNEY'S DUTY IN CASE OF CLIENT PERJURY. EO 20-0007:**

When an attorney finds out they unknowingly presented false information to the tribunal due to their client's perjury, their duty of candor to the tribunal overcomes their duty of preserving their former client's confidentiality and they must take remedial measures to undo the effect of the false information.

63. **REQUESTS FOR BINDING ETHICS OPINIONS**

The Supreme Court has finally established its own committee/suborganization that will issue *binding* ethics opinions. These will be available on the Supreme Court website. The current ethics opinions from the State Bar are non-binding. The

Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168. Recent ones concern the following:

* Termination of Representation
* Recordings by Lawyers
* Fee Sharing

64. INABILITY TO COMMUNICATE WITH CLIENT

Q: What if I can't reach or locate my client?

A: If a client moves without leaving a forwarding address or fails to communicate/respond, you may withdraw from the representation. However, you must first use reasonable diligence to locate the client to inform her of termination and you must protect client interests when withdrawing. See Ariz. Ethics Op. 01-08.

65. CONFIDENTIALITY

Q: If the details of my former client's case are now public record, am I free to discuss them?

A: Not without client consent. The duty of confidentiality survives the representation and there is no public records exception. See ABA Formal Op. 479.

66. SUBORNING PERJURY

Q: After a child custody hearing, I learned that my client had given false material testimony. When I privately discussed this with the client, he fired me. Do I have to act further now that I am no longer counsel of record?

A: Yes, you must still take a reasonable remedial measure sufficient to undo the effect of the tainted evidence. See ER 3.3(a)(3) and new AEAC EO-20-0007.

67. SUBPOENAS FOR CLIENT INFORMATION

Q: I've received a subpoena for information regarding a former client. Now what?

A: Absent the former client's consent to disclosure, you will need to object to the subpoena. If the Court denies your objection, you should discuss with the client whether to seek review of that decision. See Comment 15 to ER 1.6 and Ariz. Op. 00-11.

68. ADVERTISING MATERIAL

Q: Do I still have to mark written solicitations as "advertising material" and send a copy to the State Bar?

A: No, this rule was deleted effective January 1, 2021.

69. NEGATIVE ONLINE REVIEWS

Q: May I respond to a negative online review of my legal services?

A: A negative online review does not waive client confidentiality or trigger ER 1.6(d)(4)'s self-defense exception. Avoid engaging online or simply invite the client to contact your office to discuss. See new ABA Formal Opinion 496.

(Editor's Note: Oregon's Supreme Court reprimanded a lawyer for his response to a negative online review. A dissatisfied client called him "very crooked" and "horrible". The attorney replied by posting the client's name and criminal record. The court said although criminal convictions are public, lawyers cannot reveal things that are embarrassing or detrimental to the client)

70. PARALEGALS MUST NOT SIGN CLIENTS

Q: May I have paralegals or marketing staff sign clients?

A: No. Your nonlawyer staff may perform a variety of tasks under your supervision (including initial intake of client information) but giving a legal opinion, establishing the attorney-client relationship, and setting the scope of representation and the fee are nondelegable. See ERs 1.4, 1.5, 5.3, 5.5 and Rules 31(b), 31.2(a), Ariz. R. Sup. Ct.

71. ATTORNEY REQUIRED TO ACTUALLY SPEAK TO CLIENT BEFORE SIGNING FEE AGREEMENT.

Q: I use staff or online tools to sign clients. Do I have to speak with a client before the client signs the fee agreement?

A: Yes. "Before entering into any written attorney/client fee agreement for the firm, an Arizona licensed attorney must speak with the client and approve the legal fees to be charged and retention of the firm by the client. The attorney meeting with a potential client must be knowledgeable in the practice area, and issues that relate to the retention and retention decision must be discussed before a decision is made on the retention." *See* ***In re Phillips***, 226 Ariz. 112 (2010).

72. PERMITTED DISCLOSURE TO SUCCESSOR COUNSEL

Q: What may I disclose to successor counsel as I transition the client and the client's file?

A: Your ER 1.6 duty of confidentiality applies to these communications and precludes disclosures absent client's informed consent or authorization implied by the representation. When in doubt, seek client's consent as to what to provide to new counsel in your transfer of the representation. See new AEAC Ethics Op. EO-20-0001.

73. REMOTE WORKING

Q: I'm an Arizona lawyer, temporarily living in Utah, and working remotely for my Arizona clients. Any problem with that?

A: Probably not, but you will need to confirm that Utah does not deem this UPL and you should avoid any appearance of having a law office there. *See* ABA Formal Opinion 495 (December 16, 2020).

74. SUBSEQUENT RETENTION AFTER MEDIATION

Q: I am a solo practitioner in a small town. Last year, I mediated a dispute between two neighbors over maintenance of an overgrown oleander. Now, one of the neighbors is starting a business selling extra-wide shoes over the Internet, and she wants to retain me to draw up business formation documents. Am I allowed to represent her?

A: Yes. You are prohibited only from representing a party in connection with a matter in which you participated personally and substantially as a mediator. This representation involves a different matter, so you do not have a conflict of interest. See ER 1.12(a).*

75. DIMINISHED CAPACITY CLIENTS

Q. My elderly estate planning client seems to be showing signs of dementia. She doesn't remember our conversations, and she once became confused during a meeting and forgot she was in my office. She lives alone, but she has a son who lives a few miles away. Can I contact the client's son to express my concerns?

A. Under certain circumstances, you can take protective action when a client with diminished capacity is at substantial risk of harm and cannot act in her own interest. Protective action can include consulting with a family member, if you believe that family member will act in the client's best interests. This is a difficult issue to navigate, so read ER 1.14 and contact the Ethics Hotline for further guidance.

See also the new ARFLP Rule 37 Amendment. Substitution of Parties: Death, Incompetency, Incapacity, and Transfer of Interest. Effective January 1, 2021.

> (b) Incompetency or Incapacity. If a party becomes incompetent or incapacitated, the court may—on motion or on stipulation of the parties and the incompetent or incapacitated party's representative—permit the action to be continued by or against the party's representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent or incapacitated party's representative in the same manner that a summons and pleading are served under Rule 40(f)(1) or 41, as applicable.

76. CONFLICTS OF INTEREST WITH FORMER COLLEAGUES

Q: My former colleague left our firm to work for a competitor firm. While associated with our firm, this former colleague represented Husband in divorce from First Wife. Now, years later, Second Wife seeks to retain me to represent her in her divorce from Husband. Can I represent Second Wife, even though Husband is a former client of our firm?

A: Yes, as long as no lawyer in your firm possesses any information about Husband protected by ERs 1.6 and 1.9 c. See amended ER 1.10(b) and cmt. 5,

which clarifies the mechanism for determining if the firm is in possession of protected information for conflict purposes.

TECHNOLOGY AND CYBER SPACE TIPS

77. CYBER CRIMINALS LOVE LAW FIRMS; INSURANCE IS AN OPTION

Working remotely has created even more opportunities for criminals. The top vulnerabilities stem from unsecured work stations and data transmissions, personal devices, and not consistently enforcing the policies that keep your practice secure. Consider getting a cyber health checkup and obtaining cyber insurance.

78. VIRTUAL ASSISTANTS ARE NOT BOUND BY CONFIDENTIALITY

Alexa and all those other voice-activated devices in your home office are always listening and pose a risk to attorney-client confidentiality. At a recent Association of Professional Responsibility Lawyers conference, speakers noted that voice-prompted smart devices are on and listening **ALL OF THE TIME**. True, they may represent a low-level security risk for confidentiality breaches, but at a minimum, they ***must be turned completely off*** if it is within shouting range of where you are working. Because it is always "listening", it is not permitted to have such a device within range when you are speaking on the phone or zoom meeting or whatever. A quick check is to just shout to your device while you are on your call. If she responds, you are in trouble. Experts recommend unplugging them when they're not being used.

79. ENDING VICIOUS SLANDER CYCLES

Google's searching for a way to end a vicious slander cycle that works like this: Web sites solicit unverified complaints about supposed cheaters, sexual predators and scammers. Then anonymous posts appear high in Google results for the names of those targeted on sites like BadGirlReport or PredatorsAlert. They or their middlemen SEOblige victims to pay thousands to delete the posts. Now, Google's changing its algorithm to prevent such sites from appearing in the results when someone searches for a person's name. Victims whose nude photos were posted without consent also can request that Google suppress explicit results for their name

80. **ADVISE YOUR CLIENTS RE CYBER SECURITY CONCERNS. HERE ARE SOME TIPS:**

a. **Smart/Internet-Enabled Devices.** Let them know to take precautions to ensure the security of your smart, or internet-enabled devices, computers, vehicles, phones, Ring doorbell/cameras, garage door openers, and even household lighting.

b. **Removing Malicious Software.** There are several programs out there that can remove this kind of malicious software; one such program is Spybot Search and Destroy.

c. **Recording Calls.** Smartphones allow someone to be record conversations with third parties, even though such a practice may be illegal.

d. **Disable Drop-Ins and Change Passwords.** On Alexa (and presumably other smart devices), there are options for "drop-in". If those functions are enabled, you can say "Alexa, drop in on the kids' room" and the webcam and/or smart speaker will start listening or viewing those rooms. Now imagine that you and your spouse have not been living together for a long time and if you have not changed the passwords, your spouse still has the ability to spy on you or your kids from anywhere in the world, at any time. This has created virtual stalking issues. Clients should disable any of the drop in options if the account or passwords were accessible by their spouse. When they were set up, the client was given a password. When going through a separation/dissolution, people forget about these. They may have been set up YEARS ago. Change all passwords on everything.

e. **Stop An Ex From Stalking Through Your Phone.** In your iPhone, there is a thing called iPhone Photo "Locations" in your photos. This shows where you took pictures, where you were, etc. You can disable this. You need user names and passwords. Same thing when you are trying to mine data from someone's phone, they might say that they were at one place, but photos tell you that they were actually someplace else. These are pretty well protected by Apple. In order for you to see things you would have to have the owner's device, open it and data-mine from there. There is also something on Apple products called Significant Location Data: it is generally set to let it collect information from your device automatically. You are able to turn that off within your settings, but they do not make it easy to find.

f. **Clients should get their own Apple ID for themselves and their children.** Each person, including the kids, should have their own Apple ID. If a parent or a spouse has the Apple ID or password of their spouse or child, they have access to almost everything. When changing passwords, make sure that they have your own Apple ID and that no one else has access to it. The same thing with the children. A parent could actually log in as a child and obtain information that way. Be certain as to how the child's Apple ID is being utilized. Another consideration for having own Apple ID is this - when your client tries to separate their phone service, if their spouse is primary on the account, they may not want to "release" the phone, Apple ID or even the number to you, even if it has been your number for years. A court order may be required.

81. **VIDEO-CHATS WITH LAWYERS.** A new website is trying to make the prospect of hiring a lawyer less intimidating for consumers. Potential clients at Pro Help Legal can video-chat with attorneys in their state with clear disclosure of pricing in advance. Consumers share their legal issue and location and are matched with possible lawyers. If a selected lawyer happens to be online, the client can connect instantly - for $7.99 plus any fee the attorney charges. Attorneys and clients may extend the consult beyond the initial 15 minutes, but that happens off the platform.

LEGISLATION

82. **OOP AND USE OF RESIDENCE. Senate Bill 1441:** This was passed in June 2020 and amends A.R.S. §13-602 which governs Orders of Protection. Now, when one party is granted exclusive use of the residence and later moves out, they must let the Court know so they can inform the Defendant of their right to request a hearing.

ADMINISTRATIVE ORDERS

83. **AO 2021-39 Effective August 12, 2021.**

This updates and replaces AO 2020-45, and is to be read in conjunction with Supreme Court AO 2021-77. The fundamental difference is that the Court is returning to a phase in which masks and face coverings are mandatory, with several exceptions. Please review the AO in the Appendix for a more detailed explanation.

RULE CHANGES

84. **NOTARY REQUIREMENT FOR LEGAL FILINGS UNDER ARLFP RULE 14.A. SUSPENDED AS OF APRIL 3, 2020.**

Only ARFLP 14.a. documents normally need to be notarized. Those include an acceptance of service; affidavit in support of application for default decree; a consent decree under Rule 45 and a stipulation that substantially changes parenting time or legal decision making (unless entered into in open court or through conciliation court). This requirement has been **SUSPENDED.** Now all you have to do is file a protected address copy of a driver's license or other government issued identification card with the signed filing. ***Admin. Order No. 2020-59 issued by the Arizona Supreme Court on April 3, 2020.*** http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-59.pdf?ver=2020-04-03-102602-800&fbclid=IwAR2eYuoDnji4xAZXt5z7JnOK8884duTYDyYzcQIPPRYN9-VcH5dD_5H42O4

[**EDITOR'S TIP:** Just FYI, under ARFLP Rule 14.b., any other rule that requires a verification is satisfied with an Unsworn Declaration.] Here is the form:

I declare under penalty of perjury that everything set forth in this Stipulation is true and correct and agreed to by me.

Dated: _____ Dated: _____

_____ _____

NAME NAME

85. **ARFLP Rule 37 Amendment**. Substitution of Parties: Death, Incompetency, Incapacity, and Transfer of Interest. Effective January 1, 2021.

(a) [No change]
(b) Incompetency or Incapacity. If a party becomes incompetent or incapacitated, the court may—on motion or on stipulation of the parties and the incompetent or incapacitated party's representative—permit the action to be continued by or against the party's representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent or incapacitated party's representative in the same manner that a summons and pleading are served under Rule 40(f)(1) or 41, as applicable.

(c) [No change]

86. **ARFLP Rule 44(a)(2)(E) amended effective January 1, 2021.** Establishes that service of process has been effectuated by either (1) attaching a copy of the proof or acceptance of service *on the party in default*, or (ii) if proof *or acceptance of service appears in the court record,* by setting forth in the application the date and manner of service on the party in default.

87. **ARFLP Rule 9(c) Form 17 GOOD FAITH CONSULTATION CERTIFICATION – FORM IN APPENDIX**

88. **RULES OF EVIDENCE, RULE 513: APPLIES PRIVILEGE TO LEGAL PARAPROFESSIONALS AND THEIR CLIENTS**

89. **Licensed Legal Advocates.** This program designed by Emerge was established to license Legal Advocates to represent domestic violence victims. It requires an eight week course of study. This is very different from the Paraprofessional Licensure program, which allows any person, regardless of their degree, to represent someone in any family law proceeding.

90. **Licensed Paraprofessionals.** This Rule allows persons without a law degree to practice in family law. See Appendix.

91. **Summary Legal Consent Decrees.** Summary Consent Decree available in Maricopa County courtesy of the Honorable Bruce Cohen. See Appendix.

92. **Digital Evidence Storage.** A first in the nation, Arizona courts are creating a new digital evidence center to store sensitive documents, virtually. Pima County Superior Court and five others are piloting the program, with plans to roll it out statewide by the end of 2021. Officials say the storage, created by Thomson Reuters, will allow participants to share evidence remotely so everybody has the same version. Arizona's the first state in the country to create the Zoom-friendly digital evidence center. Though it wasn't done as a reaction to the pandemic, the courts say the timing couldn't be better and the system will be better whether courts are virtual or in person. Privacy Advocates have other thoughts.

LOCAL RULES

93. **Conciliation Court's On-Demand Platform**. The Pima County Conciliation Court's grant application to move parent education to an on-demand platform was approved for FY 2021, pending the availability of appropriations, through the State Justice Institute.

94. **On-line Orders of Protection (AZPOINT)**. Hearings on OOPs are telephonic in Pima County. More information for Pima County is available at https://www.sc.pima.gov/Portals/0/Library/OOP_info_COVID_19b.pdf?no-cache . Contested hearings are being addressed (whether telephonic or in-person) on a case-by-case basis.

95. **E-Filing.** Rolled out in Cochise County. *Almost* there in Pima County.

THE ALL THINGS EGG SECTION

IN CASE YOU WERE GETTING BORED
Compliments of Tim Eigo

STINKY EGG

The Lemonade insurance app powered by artificial intelligence tweeted that it analyzes videos of customers and gathers 100x the data points traditional insurers use. The info shapes customer profiles, predicts behavior and red-flags possible fraud. Immune to its own creepiness, Lemonade boasted that its 1M customers' details translate into billions of data points to feed its ever-growing AI. Lemonade was forced to fend off bias and discrimination accusations and send assurances its AI doesn't use physical features to deny claims. Feel better now? Thanks Tim Eigo!

SECOND STINKY EGG

Monopoly parks its place as No. 1 in family fights. Turns out one in five people have banned a board game for turning family night into family fight night. The game that gets served Boardwalking papers the most: Monopoly. Researchers asked about the most forbidden board game of all time and heard a community chest of offenses - cheating, quitting, turning on the water works, and arguments. Boomers are more likely than Gen Zers to believe they're not the problem - 71% compared to 24%. But 32% of young'ns admit they've canceled players.

AROMATIC EGG

A growing number of world leaders are advocating for a new international crime - environmental destruction, aka ecocide. They say widespread ecological disasters pose a major threat to humanity and should be criminalized in the International Criminal Court. Such a step, which faces a long road of global debate, would mean political leaders and corporate executives could face imprisonment for ecocidal acts. Advocates say decades of deforestation, oil and mineral extraction, and other enterprises have created ecological disasters, but the ICC can't currently hold corporations or governments accountable. Meanwhile, the Pope's on board, proposing making enviromental destruction is a sin.

On a related note: The Dutch Supreme Court has ruled people have fundamental rights to protection from climate change, and government must take urgent action to protect them. The ruling stems from an environmental group’s lawsuit – the first to use human rights law to force governments to cut greenhouse gas emissions. The court based its ruling in part on the European Convention on Human Rights – which binds 47

nations. So residents of those countries could use the Dutch ruling to sue their own – increasingly likely as people globally warm up to the climate change fight. ***Again, thanks for this from Tim Eigo.***

SECOND AROMATIC EGG

Chilean lawmakers are grappling with how to secure people's minds. The South American nation aims to be the world's first to legally protect citizens' neurorights. Lawmakers are expected to pass a constitutional reform blocking technology that affects people's thoughts without their consent. Proponents say advancing tech could threaten the essence of humans and their free will, and countries need to legislate together on the issue. Think they're jumping the gun? Scientists are already playing "Inception" with rats. Thank you Tim Eigo.

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APPENDIX

1. **AO 2021-39 Effective August 12, 2021.** This updates and replaces AO 2021-32.

2. **Good Faith Consultation Certificate**

3. **Rule 513: Legal Paraprofessional**

4. **AZ ST CJA § 7-210 Legal Paraprofessional**

5. **Maricopa Summary Consent Decree link.**
   https://superiorcourt.maricopa.gov/llrc/drdsc1/. Forms can be used when all of the following apply:
   a. Both spouses want to get a divorce;
   b. Both spouses agree to ALL the terms of the divorce and will work together to complete, sign and file the necessary papers;
   c. You do not have a "covenant" marriage, (these papers will not work for a covenant marriage);
   d. Either spouse has lived in Arizona at least 90 days before you file the forms; or either spouse is a member of the armed forces and has been stationed in Arizona at least 90 days before you file;
   e. If you have minor child(ren), they have resided (lived) in Arizona at least 6 months before you file the forms or you talked to a lawyer who advised you that you could pursue the case in Arizona;
   f. You believe that the marriage is irretrievably broken;
   g. Either spouse has tried to resolve your marital problems through Conciliation Services, or there is no point in trying to resolve your marital problems.

IN THE SUPERIOR COURT

IN AND FOR THE COUNTY OF PIMA

IN THE MATTER OF: RESTRICTING PHYSICAL ACCESS TO PIMA COUNTY SUPERIOR COURT FACILITIES DUE TO A PUBLIC HEALTH EMERGENCY	ADMINISTRATIVE ORDER NO. 2021- 39 (Replaces AO 2021-32)

Due to concern for the spread of COVID-19 in the general population, Arizona Governor Doug Ducey declared a statewide public health emergency. Arizona Supreme Court Chief Justice Robert Brutinel issued Administrative Order No. 2021-109 to address measures to be taken by the Judicial Branch to conduct business in a manner that ensures justice in Arizona is administered safely. Supreme Court Administrative Order No. 2021-109 directs the presiding superior court judge of each county to determine how in-person proceedings are to be conducted in each of the county's courtrooms under conditions that reduces the risks associated with COVID-19 while resuming certain operations in an orderly way that prioritizes the safety of the public, judicial officers, and employees of the judiciary. The Order calls on the presiding superior court judges to determine for the courts in their respective counties how in-person court proceedings and courthouse activities are to be phased-in and conducted, consistent with Supreme Court Administrative Order No. 2021-109. The Order further sets forth a process courts in Arizona are to use to return to full operation over time in phases. The Court is currently in Phase III.

This Court issued Administrative Orders 2020-12, 2020-45 ,2021-21 and 2021-32 to address the Court's response to the COVID-19 pandemic. This Administrative Order replaces 2021-32. The extent to which it impacts 2021-32 (which replaced 2020- 21) is set forth below. This Order addresses only Pima County Superior Court functions. As a result of the continued presence of COVID-19 and pursuant to Supreme Court Administrative Order No. 2021-109 and Supreme Court Administrative Order No. 2017-79. Its effective date will be August 12, 2021, as ordered hereinafter.

IT IS ORDERED Arizona Supreme Court Administrative Order 2021-109 is hereby incorporated by this reference and adopted in its entirety.

IT IS ORDERED all jury trials to be heard by the Court shall presumptively be conducted in-person. Upon a showing of good cause, the assigned trial division may allow a party, witness, victim or lawyer to appear or participate in the trial by teleconference or video conference.

IT IS ORDERED until further order of this Court, all other matters to be heard by the Court, as set forth hereinafter, shall presumptively be conducted by teleconferencing or by video conferencing unless designated otherwise within this order. Any request for an in-person hearing must be made not less than two (2) court days in advance of the time of hearing, and not at the time of hearing. Any in-person event shall be conducted in full compliance with the terms and conditions of this Administrative Order, Arizona Supreme Court Administrative Order 2021-109 and guidelines established by the Center for Disease Control, the Arizona Department of Health Services, and the Pima County Health Department. If the Court determines a party has failed to reasonably comply with this Order, the Court will determine what sanctions, if any, including contempt of court, are appropriate.

IT IS FURTHER ORDERED that all people in attendance at any in-person event must maintain a minimum of three (3) feet social distance from all other persons in the courtroom and must wear a mask or face covering over their nose and mouth. Each judge has discretion to control and limit the number of people in a courtroom and may excuse any person from the courtroom as deemed appropriate or necessary to meet the ends of this Administrative Order.

IT IS FURTHER ORDERED that any person intending to be present at a court proceeding must notify the assigned judicial division by telephone or email prior to appearing at the courthouse of any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities and to make alternative arrangements to appear by teleconference or video conference, have their appearance waived, or have the proceeding reset. Any such person shall not attend the court event in person.

IT IS FURTHER ORDERED that all persons entering the courthouse, including attorneys, parties, victims, witnesses, jurors, Court Appointed Special Advocates (CASA), court personnel, and others, must notify the court in advance of any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities, and to make alternative arrangements to participate. Failure to do so may result in issuance of sanctions, including but not limited to contempt of court.

IT IS FURTHER ORDERED that all persons entering a courthouse (including the buildings on the campus of Pima County Superior Court Juvenile Division), including but not limited to attorneys, parties, victims, witnesses, jurors, CASA, court personnel, judicial officers and other necessary persons shall wear their own or court-provided mask or face covering over their nose and mouth. The wearing of a mask or face covering is mandatory for all persons regardless of vaccination status while in a court facility. Court personnel may remove their mask or face covering while they are at their workspace and able to maintain appropriate social distancing from any other person. This Order does not serve to require the Court to provide masks or face coverings.

IT IS FURTHER ORDERED that during in-courtroom proceedings, the judicial officer presiding may authorize removal of masks or face coverings for purposes of witness testimony, defendant identification, making an appropriate record, or other reasons as deemed necessary by the judicial officer, provided that appropriate social distancing or other protective measures are followed.

IT IS ORDERED any in-person appearance may be converted to a teleconference or video conference by order of the Court, unless an in-person appearance is required by United States or Arizona Constitutions, or by statute or rule.

IT IS ORDERED the following bench-specific hearings may be conducted during the term of this Administrative Order:

I. CIVIL:

Civil hearings and settlement conferences will presumptively be conducted by teleconference or video conference unless the Court orders otherwise. The Court expects that all in-person hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly.

II. CRIMINAL:

The following hearings may be conducted, and will presumptively be conducted by teleconference or video conference unless the Court orders otherwise:

- Initial Appearances
- Changes of Plea
- Motions to Modify Conditions of Release
- Case Management Conferences
- Status Conferences
- Any other matter as the Court may deem appropriate or necessary.

The following hearings may be presumptively conducted in person, by teleconference or video conference:

- Sentencings and Dispositions
- Preliminary Hearings
- Arraignments

The Court expects that all hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly.

III. FAMILY:

Hearing and trials will presumptively be conducted by teleconference or video conference unless the Court orders otherwise. If a party wishes to have a hearing converted to an in-person hearing, a motion must be filed at least two (2) court days in advance of the time of hearing, and not at the time of hearing. Unless there is a current order prohibiting contact between the parties or a history of domestic violence between self-represented parties, the motion must set forth the other party's position on an in-person hearing.

The Court expects that all hearings scheduled while this Administrative Order is in effect will be necessary and productive. Parties and counsel must confer in good faith in an attempt to resolve any issue set for hearing unless consultation is excused as set forth in Rule 9(c)(2), ARFLP. For any party or counsel that fails to comply with this good faith consultation requirement, the Court may enter sanctions consistent with Rule 76.2.

IV. JUVENILE:

The following hearings will be conducted in-person if the child has been detained, unless otherwise ordered by the Court:

- Detention hearings
- Trial reviews
- Adjudications
- Dispositions
- Evidentiary hearings

The following hearings may be conducted in person if requested by a party, or as ordered by the Court:

- Contested dependencies .
- Contested severances
- Temporary custody hearings
- Rule 59 Motions
- Other hearings required by law to be heard at juvenile subject to a statutory or juvenile rules timelines, or as the Court may deem appropriate or necessary

All other matters will be conducted by teleconference or video conference, unless the Court orders otherwise.

In addition to necessary courtroom staff and support personnel, those attending hearings in person may include parties and their attorneys, parents in delinquency matters, victims and victim witness advocates CASA, and witnesses. All others, including placement representatives, supporting family, and service providers must appear by phone or video conferencing as permitted by the judge. Witnesses may appear by telephone through agreement of the parties or as ordered by the Court pursuant to Ariz. R. P. Juv. Ct. 42.

V.PROBATE:

The following hearings may be conducted, and will presumptively be conducted by teleconference or video conference unless the Court orders otherwise:

- Title 36 Mental Health Hearings
- Appointment of Guardian and/or Conservator, both emergency/temporary requests and permanent requests
- Requests to remove a guardian and/or conservator
- Petitions to open a probate with or without a will and the appointment of a personal representative or special administrator
- Requests to remove a personal representative or special administrator
- Requests for the release of restrictions on assets in estate
- Petitions to remove a trustee
- Petitions regarding disposition of a decedent's body
- Petitions to determine the validity of or enforce a health care directive
- Any other matter as the Court may deem appropriate or necessary

The court expects that all hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly. Trial divisions will continue to coordinate calendars through the bench presiding judge.

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OTHER ORDERS:

IT IS ORDERED that each bench presiding judge may issue bench-specific internal protocols to manage personnel and process caseloads during the pendency of this Administrative Order. Each bench presiding judge is to make any such internal protocols available upon request, subject to any limitations or conditions provided by rule, statute or constitutional considerations.

IT IS FURTHER ORDERED each bench presiding judge may limit the number of hearings judges on that particular bench may conduct. Judges conducting hearings may place time limits on matters and exercise any other control over proceedings deemed appropriate or necessary to meet the terms of this Administrative Order and to further the interests of justice.

IT IS FURTHER ORDERED that all emergency public health cases will proceed as directed by the Court.

IT IS FURTHER ORDERED that requests by media to appear at a proceeding must be made to the Court's Public Information Officer via email at communityrelations@sc.pima.gov to coordinate such an appearance.

IT IS FURTHER ORDERED the Presiding Judge may grant contractors and attendant personnel access to Court buildings.

IT IS FURTHER ORDERED that to the extent this order is inconsistent with Superior Court Administrative Order 2021-35 (applicable to limited jurisdiction courts), this Order controls.

IT IS FURTHER ORDERED this Order is effective on **August 12, 2021.** Until that date, the procedures in AO 2021-32 remain in effect.

Dated this 12th day of August 2021.

JEFFREY T. BERGIN
PRESIDING JUDGE

cc: Ron Overholt, Court Administrator
Superior Court Judges
Juvenile Court Judges
Community Relations
Gary Harrison, Clerk of Court
Michelle Madrid, Director, Case Management Services
Karen Kahle, Managing Court Reporter
Ramiro Alviar, Director, Interpreter's Office

Laura Conover, Pima County Attorney
Dean Brault, Pima County Public Defense Services
Joel Feinman, Pima County Public Defender
James Fullin, Pima County Legal Defender
Verne Hill, Office of Court Appointed Counsel
Kevin Burke, Pima County Legal Advocate's Office
Judicial Security
Conciliation Court
Krisanne LoGalbo
Aaron Nash, Administrative Office of the Courts

Attachment
Rule 97, Arizona Rules of Family Law Procedure

Form 17. Good Faith Consultation Certificate

Name: _____
Mailing Address (unless protected): _____
City, State, Zip Code: _____
Daytime Phone Number: _____
Evening Phone Number: _____
Email Address: _____
Representing: [ ] Self [ ] Petitioner [ ] Respondent
State Bar Number: _____

ARIZONA SUPERIOR COURT, COUNTY OF _____

_____ Case No. _____
Petitioner

GOOD FAITH CONSULTATION CERTIFICATE

_____
Respondent

Name of Judge/Commissioner _____

Pursuant to Rule 9(c) of the Arizona Rules of Family Law Procedure, the ___ Petitioner OR ___ Respondent submits this Good Faith Consultation Certificate and states either:

(a) [ ] A good-faith attempt to resolve the issue was made with the opposing party, or counsel if represented, and the consultation or attempted consultation was made in person or by telephone and not merely by letter or email.

OR

(b) [ ] There is a current court order prohibiting contact between the parties and neither party is represented by counsel, or a history of domestic violence between self-represented parties, so the parties are not required to personally meet or contact each other.

VERIFICATION

Under penalty of perjury, I state to the Court that the contents of this document are true and correct.

_____ _____

Date Signature of Person Filing Document

CERTIFICATE OF SERVICE

[ ] I filed the original of the attached document with the Clerk of the Superior Court in the county listed above on _____.
Month Date Year

[ ] I mailed or delivered a copy of the attached document to the judicial officer (judge or commissioner) assigned to this case on _____.
Month Date Year

[ ] I mailed or delivered a copy of the attached document to the Office of the Attorney General for the State of Arizona (if applicable) on _____.
Month Date Year

[ ] I mailed or delivered a copy of the attached document to the opposing party or the opposing party's attorney, if represented by counsel, on _____.
Month Date Year

_____ _____

Name of Opposing Party Name of Opposing Party's Attorney

_____ _____

Address of Opposing Party Address of Opposing Party's Attorney

_____ _____

City, State, Zip Code City, State, Zip Code

_____ _____

Date Signature

Home Table of Contents

Rule 513. Legal Paraprofessional
Arizona Revised Statutes Annotated
Rules of Evidence for Courts in the State of Arizona
Effective: January 1, 2021

Arizona Revised Statutes Annotated
Rules of Evidence for Courts in the State of Arizona (Refs & Annos)
Article V. Privileges

Effective: January 1, 2021

Arizona Rules of Evidence, Rule 513

Rule 513. Legal Paraprofessional

Currentness

A communication between a legal paraprofessional and a client is privileged if it is made for the purpose of securing or giving legal advice, is made in confidence, and is treated confidentially. This privilege is co-extensive with, and affords the same protection as, the attorney-client privilege.

Credits

Added Aug. 27, 2020, effective Jan. 1, 2021.

17A Pt. 1 A. R. S. Rules of Evid., Rule 513, AZ ST REV Rule 513
Current with amendments received through 11/1/2020.

END OF DOCUMENT

Arizona Revised Statutes Annotated
Code of Judicial Administration
Part 7. Administrative Office of the Courts
Chapter 2. Certification and Licensing Programs

AZ ST Code of Jud. Admin., § 7-210

Section 7-210: Legal Paraprofessional

Effective: January 1, 2021
Currentness

A. Definitions. In addition to the definitions in ACJA § 7-201(A), the following definitions apply to this section:

"Advocacy" means course content or practical experience that demonstrates and develops skills that are associated with conducting court hearings and trials, administrative hearings, mediation and arbitration, and settlement and plea negotiation.

"Board" means the Board of Nonlawyer Legal Service Providers.

"Civil procedures course" means at least 3 credits from a course dedicated to civil procedure and the remaining required credits can be obtained through a course or courses that cover an area of civil law, such as administrative law, if the course includes procedural law content.

"Experiential learning" means learning through a format such as an internship, externship or clinical experience during which students develop knowledge, skills, and values from direct experiences outside a traditional academic setting.

"Legal Paraprofessional" ("LP") means an individual licensed pursuant to this section to provide legal services without the supervision of an attorney in the areas of law and within the scope of practice defined herein.

"Legal specialization course"means a course that covers substantive law or legal procedures and that was developed specifically for, and that teaches practical skills needed by, paralegals or legal paraprofessionals. For clarity, courses in general "business law" designed for undergraduate or graduate business curriculums and law-related courses that focus solely on theory do not qualify as a legal specialization course.

"Substantive law-related experience" means the provision of legal services as a paralegal or paralegal student including, but not limited to, drafting pleadings, legal documents or correspondence, completing forms, preparing reports or charts, legal research, and interviewing clients or witnesses in the area(s) or practice the applicant seeks to be licensed. Substantive law-related experience does not include routine clerical or administrative duties.

B. Applicability. This section applies to individuals who provide legal services within the exception to the prohibition of the unauthorized practice of law set forth in Supreme Court Rule 31.3(e)(4) and this section. To qualify to provide legal services under the specified exception pursuant to Rule 31.3(e)(4) and this section, legal paraprofessionals shall hold a valid license and perform their duties in accordance with subsection (F). A person shall not represent that he or she is a legal paraprofessional unless the person holds an active license as a legal paraprofessional. This section is read in conjunction with ACJA § 7-201: General Requirements, and the Arizona Rules of Supreme Court governing the practice of law. In the event of any conflict between the Arizona Rules of Supreme Court, ACJA § 7-201, and ACJA § 7-210, the Rules of Supreme Court shall govern.

C. Purpose. The supreme court has inherent regulatory power over all persons providing legal services to the public, regardless of whether they are lawyers or nonlawyers. Accordingly, this section is intended to result in the effective administration of the legal paraprofessional licensing program.

D. Administration.

1. *Role and Responsibilities of the Supreme Court.* In addition to the requirements of ACJA § 7-201(D), the supreme court shall review recommendations from the board for licensure of applicants and make a final determination on the licensure of these applicants.

2. *Establishment and Administration of Fund.* The supreme court shall establish a legal paraprofessional fund consisting of monies received for license fees, costs, and civil penalties. The supreme court shall administer the legal paraprofessional fund and shall receive and expend monies from the fund.

3. *Role and Responsibilities of the Division Staff.* These responsibilities are contained in ACJA § 7-201(D).

4. *Board of Nonlawyer Legal Service Providers.* In addition to the requirements of ACJA § 7-201(D) the following requirements apply:

a. The Board of Nonlawyer Legal Service Providers is established, comprised of the following eleven members appointed by the chief justice:

(1) Two certified legal document preparers;

(2) Until June 30, 2022, two additional members and thereafter, two legal paraprofessionals,

(3) One judge or court administrator;

(4) One clerk of the superior court or designee;

(5) One attorney;

(6) Two public members; and

(7) Two additional members.

b. The board shall issue licenses to qualified applicants pursuant to subsections (E)(2) and (3).

c. On or before April 1 of each year, the board shall file a report with the supreme court describing the status of the legal paraprofessional program. The report shall include but is not limited to, the following information:

(1) The number of applications granted and declined during the previous calendar year;

(2) The number of licensed legal paraprofessionals as of December 31 of the previous calendar year;

(3) The number of charges filed against legal paraprofessionals during the previous calendar year and the nature of the charge(s);

(4) The number of complaints initiated by the state bar during the previous calendar year and the nature of the complaint;

(5) Discipline imposed during the previous calendar year, the nature of the conduct leading to the discipline and the discipline imposed; and

(6) Recommendations concerning modifications or improvements to the legal paraprofessional program.

d. The state bar shall provide the board with the following information:

(1) On a calendar quarter basis:

(a) The number of charges filed against legal paraprofessionals during the previous calendar quarter and the nature of the charge(s);

(b) The number of complaints initiated by the state bar during the previous calendar quarter and the nature of the complaint; and

(c) Discipline imposed during the previous calendar quarter, the nature of the conduct leading to the discipline and the discipline imposed.

(d) The current list of licensed LP's; the state bar shall submit a copy to the clerk of the supreme court.

(2) On or before January 31 on an annual basis:

(a) the number of licensed legal paraprofessionals as of December 31; and

(b) Recommendations concerning modifications or improvements to the legal paraprofessional program.

(3) Such other information as the board may request to prepare the report described in (D)(4)(c) herein.

E. Licensure. In addition to the requirements of ACJA § 7-201(E)(1) through (5), the following requirements apply:

1. *Necessity.* A person shall not represent that the person is a legal paraprofessional, or is authorized to provide legal services, without holding a valid license pursuant to this section.

2. *Eligibility for Applying for a License.*

a. All potential applicants for a license, in addition to meeting the requirements set forth in subsection (E)(3), shall meet the examination requirements of this subsection.

(1) Potential applicants for a license shall successfully pass the examination prior to submitting an application for licensure.

(2) Upon a potential applicant passing the examination, division staff shall forward notice to the potential applicant of the potential applicant's fulfillment of the examination requirement and provide the potential applicant with a license application form which shall include forms necessary for a review of qualification based on character and fitness.

b. *Administration of the Examination.* In addition to the requirements of ACJA § 7-201(E):

(1) The examinations for a license shall consist of:

(a) a test on legal terminology, substantive law, client communication, data gathering, document preparation, the ethical code for LPs, and professional and administrative responsibilities pertaining to the provision of legal services, as identified through a job analysis conducted at the direction of the board; and

(b) a substantive law test on each of the areas of practice described in subsection (F)(2) in which the applicant seeks to be licensed. The examinations shall be administered in a board-approved format and delivery method.

(2) Administration of reexaminations. These requirements are contained in ACJA § 7-201(E)(1)(f)(2).

3. *Licensing.*

a. Fingerprinting. Pursuant to ACJA § 7-201(E)(1)(d), an applicant shall furnish fingerprints for a criminal background investigation.

b. Eligibility for License; Education. The board shall grant a license to an applicant who possesses the following qualifications:

(1) A citizen or legal resident of the United States;

(2) At least twenty-one years of age;

(3) Not have been denied admission to the practice of law in Arizona or any other jurisdiction;

(4) An applicant disbarred or suspended from the practice of law in Arizona or any other jurisdiction may only be granted a license if approved by the supreme court;

(5) Of good moral character;

(6) Complies with the laws, court rules, and orders adopted by the supreme court governing legal paraprofessionals in this state;

(7) The applicant has successfully passed the legal paraprofessional examination for each area of practice in which they seek licensure;

(8) The applicant has been deemed qualified by the board based on character and fitness; and

(9) The applicant shall also possess one of the following combinations of education:

(a) An associate-level degree in paralegal studies or an associate-level degree in any subject plus a certificate in paralegal studies approved by the American Bar Association or is offered by an institution that is accredited by an institutional accrediting agency recognized by the U.S. Department of Education or the Council for Higher Education Accreditation (CHEA) and that requires successful completion of a minimum of 24 semester units, or the clock hour equivalent, in legal specialization courses which shall include a minimum of:

(i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy;

(iii) For the administrative law endorsement: 3 credit hours in administrative law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning under the supervision of a lawyer that includes content on advocacy;

(iv) For all endorsements, a minimum of 3 credit hours in professional responsibility.

All applicants meeting the education requirements of (9)(a) must also have one (1) year of substantive law-related experience under the supervision of a lawyer in the area of practice of each endorsement sought.

(b) Four-year bachelor's degree in law from an accredited college or university and approved by the court that included the following coursework:

(i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iii) For the administrative law endorsement: 3 credit hours in administrative law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iv) For all endorsements, a minimum of 3 credit hours in professional responsibility.

(c) Completed a certification program for legal paraprofessionals approved by the Arizona Judicial Council. Certification programs may be for credit or noncredit but must be offered through an educational institution that is at least regionally accredited. Certification programs must provide the subject matter courses that meet the credit hours or equivalent clock hours in the subject matter areas required for each subject matter area endorsement.

(d) A Master of Legal Studies (MLS) from an American Bar Association accredited law school that included the following coursework:

(i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iii) For the administrative law endorsement: 3 credit hours in administrative law, 3 credit hours in evidence, 3 credit hours of legal research an writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iv) For all endorsements, a minimum of 3 credit hours in professional responsibility.

(e) A Juris Doctor from a law school accredited by the American Bar Association.

(f) Foreign-trained lawyers with a Master of Laws (LLM) from an American Bar Association accredited law school that included the following coursework:

(i) For the family law and civil practice endorsement: 3 credit hours in family law and 6 credit hours in civil procedures, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(ii) For the criminal law endorsement: 3 credit hours in criminal law, 3 credit hours in evidence, 3 credit hours of legal research and writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iii) For the administrative law endorsement: 3 credit hours in administrative law, 3 credit hours in evidence, 3 credit hours of legal research an writing, and a minimum of 120 hours of experiential learning that includes content on advocacy;

(iv) For all endorsements, a minimum of 3 credit hours in professional responsibility.

c. Eligibility for License; Experience. The board shall grant a license to an applicant who does not meet the requirements of (b)(9) of this section, but who possesses the following qualifications:

(1) A citizen or legal resident of the United States;

(2) At least twenty-one years of age;

(3) Not have been denied admission to the practice of law in Arizona or any other jurisdiction;

(4) An applicant disbarred or suspended from the practice of law in Arizona or any other jurisdiction may only be granted a license if approved by the Supreme Court;

(5) Of good moral character;

(6) Complies with the laws, court rules, and orders adopted by the supreme court governing legal paraprofessionals in this state;

(7) The applicant has successfully passed the legal paraprofessional examination pursuant to (E)(2)(b) herein;

(8) The applicant has been deemed qualified by the board based on character and fitness; and

(9) Has completed 7 years of full-time substantive law-related experience within the 10 years preceding the application, including experience in the practice area in which the applicant seeks licensure as follows:

(a) For licensure in family law, limited jurisdiction civil, and limited jurisdiction criminal, 2 years of substantive law-related experience in each area in which the applicant seeks licensure.

(b) For landlord-tenant, debt collection, and administrative law, 2 years of substantive law-related experience in each area in which the applicant seeks licensure.

(10) Proof of substantive law-related experience will be certified by supervising attorney, meeting the following requirements:

(a) The name and Bar number of the supervising lawyer(s);

(b) Certification by the lawyer that the work experience meets the definition of substantive law-related experience in the practice area in which the applicant will be licensed as defined in (A); and

(c) The dates of the applicant's employment by or service with the lawyer(s) or licensed paralegal practitioner(s).

d. Professionalism Course. Within one year after being licensed, a newly licensed LP shall complete the state bar course on professionalism. A newly licensed LP who fails to comply with the requirements of this paragraph shall be summarily suspended upon motion of the state bar pursuant to Rule 62, provided that a notice of non-compliance shall have been sent to the LP, mailed to the LP's last address of record at least thirty days prior to such suspension, but may be reinstated in accordance with the rules of reinstatement herein.

F. Role and Responsibilities of Licensees.

1. *Authorized Services.* Upon successful completion of a substantive law exam described in subsection (E)(2)(b) for one or more of the areas of practice described in subsection (F)(2) and the board's endorsement on the legal paraprofessional's license, a legal paraprofessional is authorized to render legal services within the scope of practice defined in subsection (F)(2), without the supervision of an attorney, including:

a. Prepare and sign legal documents;

b. Provide specific advice, opinions, or recommendations about possible legal rights, remedies, defenses, options, or strategies;

c. Draft and file documents, including initiating and responding to actions, related motions, discovery, interim and final orders, and modification of orders, and arrange for service of legal documents;

d. Appear before a court or tribunal on behalf of a party, including mediation, arbitration, and settlement conferences where not prohibited by the rules and procedures of the forum; and

e. Negotiate legal rights or responsibilities for a specific person or entity.

2. *Areas of Practice; Scope of Practice.*

a. Family Law. Legal paraprofessionals may render authorized services in domestic relations, except they may not represent any party in a matter that involves the following unless the legal paraprofessional has met additional qualifications as established by the supreme court.

(1) Preparation of a Qualified Domestic Relations Order (QDRO) and supplemental orders dividing retirement assets;

(2) Division or conveyance of formal business entities or commercial property; or

(3) An appeal to the court of appeals or supreme court.

b. Limited Jurisdiction Civil. Legal paraprofessionals may engage in authorized services in any civil matter that may be or is before a municipal or justice court of this state.

c. Limited Jurisdiction Criminal. Legal paraprofessionals may render authorized services in criminal misdemeanor matters before a municipal or justice court of this state where, upon conviction, a penalty of incarceration is not at issue, whether by law or by agreement of the prosecuting authority and trial court.

d. Administrative Law. Legal paraprofessionals may engage in authorized services before any Arizona administrative agency that allows it. Legal paraprofessionals are not authorized to represent any party in an appeal of the administrative agency's decision to a superior court, the court of appeals, or the supreme court, except that the legal paraprofessional may file an application or notice of appeal. LPs are not authorized to represent any lawyer or LP before the court, presiding disciplinary judge, or hearing panel.

3. *Code of Conduct.* Each legal paraprofessional shall adhere to the code of conduct in subsection J.

4. *Identification.* A legal paraprofessional shall include the practitioner's name, the title "Arizona Legal Paraprofessional" or the abbreviation "LP" and the legal paraprofessional's license number on all documents prepared by the legal paraprofessional, unless expressly prohibited by a non-judicial agency or entity. The legal paraprofessional shall also provide the practitioner's name, title and license number to any person upon request.

5. *Notification of Discipline.* A license holder who has been disbarred from the practice of law in any state since original licensure as a legal paraprofessional shall provide the information regarding the disbarment to the board within 30 days of service of the notice of the disbarment.

6. *Notification of Denial of Admission.* A license holder who has been denied admission to the practice of law or suspended or disbarred from the practice of law in any jurisdiction since original licensure as a legal paraprofessional shall provide the information regarding the denial to the board and state bar within 30 days of service of the notice of the denial.

G. Complaints, Investigation, Disciplinary Proceedings, and Continuing Legal Education. The Supreme Court Rules governing complaints, investigations, discipline, sanctions, reinstatement, continuing legal education, and public access to state bar records are applicable to legal paraprofessionals, except:

1. Rule 44 is not applicable to legal paraprofessionals.

2. Rule 60(a)(1) is applicable to legal paraprofessionals, except that the term "revocation" shall replace the term "disbarment."

3. Reinstatement proceedings under Rules 64 and 65, Rules of Supreme Court, are applicable to legal paraprofessionals, except the term "revoked" or "revocation" shall replace the term "disbarred" or "disbarment."

H. Policies and Procedures for Board Members. These requirements are contained in ACJA § 7-201(I).

I. Continuing Legal Education Policy.

1. *Purpose.* Ongoing continuing legal education ("CLE") is one method to ensure legal paraprofessionals maintain competence in the field after licensure is obtained. Continuing education also provides opportunities for legal paraprofessionals to keep abreast of changes in the profession and the Arizona judicial system.

2. *Applicability.* All legal paraprofessionals shall comply with the continuing education requirements of Rule 45, Arizona Rules of Supreme Court. Continuing education must relate to the subject matter in which the legal paraprofessional is endorsed to practice.

3. *Responsibilities of Legal Paraprofessionals.*

a. It is the responsibility of each legal paraprofessional to ensure compliance with the continuing education requirements, maintain documentation of completion of continuing education, and to submit the maintained documentation to the nonlawyer legal service provider program upon the request of the board or division staff.

b. Upon request, each legal paraprofessional shall provide any additional information required by the board or division staff when reviewing renewal applications and continuing education documentation.

J. Code of Conduct. This code of conduct is adopted by the supreme court to apply to all legal paraprofessionals in the State of Arizona. The purpose of this code of conduct is to establish rules of professional conduct and minimum standards for performance by legal paraprofessionals.

1. *Ethics.* Each legal paraprofessional is bound by Supreme Court Rule 42, Arizona Rules of Professional Conduct in accordance with the following:

a. References to "lawyer(s)" are to be read as "legal paraprofessional(s)."

b. References to "applicant" or "applicant for admission to the state bar" is to be read as applicant for a legal paraprofessional license.

c. References to "admission to practice" or "admitted to practice" shall be read as licensed as an LP.

d. ER 5.5(a) through (b) applies to LPs. ER 5.5(c) through (h) are not applicable.

2. *Professionalism.* Each legal paraprofessional shall adhere to Supreme Court Rule 41, except for the Oath of Admission to the Bar.

3. *Trust Accounts.* Each legal paraprofessional shall adhere to Supreme Court Rule 43.

4. *Insurance Disclosures.* Each legal paraprofessional shall adhere to Supreme Court Rule 32(c)(13).

5. *Performance in Accordance with Law.*

a. A legal paraprofessional shall perform all duties and discharge all obligations in accordance with applicable laws, rules, or court orders.

b. A legal paraprofessional shall not represent that the practitioner is authorized to practice law beyond the areas of practice and scope of practice as provided in subsections (F)(1) and (2).

c. A legal paraprofessional shall not use the designations "lawyer," "attorney at law," "counselor at law," "Esq. or other equivalent words, the use of which is reasonably likely to induce others to believe the legal paraprofessional is authorized to engage in the practice of law beyond that allowed by the practitioner's license. Any communications concerning an LP's services must identify the LP as being a legal paraprofessional.

d. A legal paraprofessional shall not provide any kind of advice, opinion or recommendation to a client about possible legal rights, remedies, defenses, options, or strategies unless the practitioner has the license and subject matter area specific endorsement to do so.

